Supreme Court, U.S.
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No. 05-

IN THE
Supreme Court of the United States

JOHN MAPU, JR.,

Petitioner,

v.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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November 14, 2005

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QUESTION PRESENTED

Whether the Federal Circuit erred, and created a circuit conflict, by holding that Congress implicitly precludes equitable tolling by providing one or more exceptions to a particular statutory deadline.

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INTRODUCTION

This petition presents the question whether the Federal Circuit will be allowed effectively to write the doctrine of equitable tolling out of existence. The very predicate for the application of that doctrine is that a litigant has missed a deadline; only then does the litigant need to invoke the doctrine at all. It logically follows, therefore, that a mere failure to comply with a statutory deadline cannot be a reason to preclude equitable tolling, because equitable tolling assumes such noncompliance in the first place. Here, Congress crafted an exception to a statutory deadline: while a veteran's notice of appeal generally must be *received* by the Court of Appeals for Veterans Claims on or before the due date, the notice of appeal is timely if *postmarked* by the United States Postal Service on or before the due date. 38 U.S.C. § 7266. The statute says nothing about appeals sent by Federal Express, so the "postmark" exception reasonably can be construed not to encompass such appeals. But it does not follow that equitable tolling is inapplicable to such appeals. To the contrary, Congress legislates against a background rule of equitable tolling, and the innocent mistake in this case (sending a notice of appeal by Federal Express rather than U.S. mail at the height of the 2001 anthrax crisis) provides a classic setting for application of the doctrine.

The Federal Circuit held below, however, that Congress implicitly precluded equitable tolling with respect to veterans' appeals filed by Federal Express because such appeals do not fall within the scope of the statutory "postmark" exception. But that is a *non sequitur*. Establishing that an appeal is untimely is not the same as establishing that Congress implicitly precluded equitable tolling with respect to that appeal; as noted above, equitable tolling only comes into play in the first place if a litigant has missed a deadline. The Federal Circuit's approach thus renders equitable tolling

a dead letter, by providing that the very predicate for the doctrine implicitly precludes its application.

The decision below thus conflicts with the "hornbook law that limitations periods are customarily subject to equitable tolling unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotations omitted). Nothing in the text (not to mention the structure or history) of the veterans' appeal statute remotely suggests that Congress intended to preclude equitable tolling with respect to untimely appeals filed by Federal Express. To the contrary, the Federal Circuit simply drew a negative inference from the fact that Congress did not include such appeals within the scope of the "postmark" exception. But the very lesson of *Young* is that such a negative inference is insufficient to establish that Congress "implicitly precluded" the background doctrine of equitable tolling. *See id.* at 49-53.

Not surprisingly, thus, every other circuit to address the issue has concluded that Congress does *not* implicitly preclude equitable tolling by simply providing one or more specific exceptions to a particular statutory deadline. *See, e.g., Neverson v. Farquharson*, 366 F.3d 32, 40-41 (1st Cir. 2004); *Chung v. Department of Justice*, 333 F.3d 273, 277 (D.C. Cir. 2003); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999). Until the decision below, indeed, it was safe to say (as did the D.C. Circuit in *Chung*) that "neither the Supreme Court nor any other court has deemed that negative implication alone sufficient to defeat the presumption" in favor of equitable tolling. *Chung*, 333 F.3d at 277.

To be sure, there is no circuit conflict on the specific question whether the veterans' appeal statute "implicitly precludes" equitable tolling with respect to appeals filed by Federal Express. But that is only because the Federal Circuit has exclusive jurisdiction over such appeals, so by definition no such specific conflict can develop. There can

be no question, however, that the Federal Circuit's reasoning conflicts with this Court's teachings on equitable tolling, and with the reasoning of other courts of appeals applying those teachings. This Court should not allow the Federal Circuit to write the doctrine of equitable tolling out of existence, especially in the context of veterans' appeals, which typically involve *pro se* filers in what is supposed to be a non-adversarial benefits scheme. Accordingly, this Court should grant this petition, and either set this case for plenary review or summarily reverse the decision below.

OPINIONS BELOW

The Federal Circuit's decision is reported at 397 F.3d 1375 and reprinted in the Appendix ("App.") at 1a-10a. The final unreported decision of the United States Court of Appeals for Veterans Claims ("CAVC") dismissing petitioner's appeal is reprinted at App. 13a-20a. The Federal Circuit's unpublished order vacating the CAVC's prior panel decision dismissing petitioner's appeal is reprinted at App. 23a-24a, and the latter unreported decision is reprinted at App. 25a-27a. The CAVC's initial unreported single-judge decision dismissing petitioner's appeal is reprinted at App. 28a-30a. The underlying Board of Veterans' Appeals' decision denying petitioner's application for service-connected benefits is reprinted at App. 33a-54a.

JURISDICTION

The Federal Circuit rendered its decision on February 15, 2005, App. 1a, and denied a timely petition for panel rehearing and rehearing en banc on June 16, 2005, App. 11a-12a. On September 7, 2005, Justice Breyer granted petitioner's application to extend the time within which to file a petition for a writ of certiorari to November 13, 2005. Because that day is a Sunday, this petition is timely filed on Monday, November 14, 2005. *See* S. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

38 U.S.C. § 7266 provides:

> (a) In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104 (e) of this title.
>
> (b) An appellant shall file a notice of appeal under this section by delivering or mailing the notice to the Court.
>
> (c) A notice of appeal shall be deemed to be received by the Court as follows:
>
> (1) On the date of receipt by the Court, if the notice is delivered.
>
> (2) On the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed.
>
> (d) For a notice of appeal mailed to the Court to be deemed to be received under subsection (c)(2) on a particular date, the United States Postal Service postmark on the cover in which the notice is posted must be legible. The Court shall determine the legibility of any such postmark and the Court's determination as to legibility shall be final and not subject to review by any other Court.

STATEMENT OF THE CASE

Petitioner John Mapu, Jr. is a disabled United States Army veteran pursuing benefits for service-connected injuries that resulted from a serious fall he endured during airborne training exercises in 1980. On July 31, 2001, the Board of Veterans' Appeals ("BVA") denied Mapu's application for such benefits. App. 33a-54a. A separate form included with the order denying benefits informed Mapu that he could appeal that decision to the United States Court of Appeals for Veterans Claims ("CAVC") in Washington, D.C. by filing a notice of appeal with that court "within 120 days" of the BVA's decision. App. 55a.

Acting *pro se*, Mapu went to a U.S. Post Office on November 28, 2001—the 120th day after the BVA's decision—intending to send his notice of appeal to the CAVC by overnight U.S. mail. App. 2a, 21a, 31a. Postal officials, however, informed him that overnight U.S. mail deliveries to Washington had been suspended in light of the contamination of postal facilities with anthrax. App. 2a, 21a-22a, 31a. In order to ensure that the CAVC would promptly receive Mapu's notice of appeal, Mapu's sister—a postal employee—asked her manager whether there was any way Mapu could send his appeal to Washington by overnight mail. App. 21a-22a. The manager confirmed that the U.S. Postal Service ("USPS") had suspended its own overnight deliveries, but "[b]ecause the USPS was partnering with FedEx, he suggested that the appeal be sent using FedEx." App. 2a, 22a, 28a.[1]

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[1] In January 2001, the USPS agreed to pay Federal Express $6.3 billion to fly its Express and Priority mail and permit Federal Express to place collection boxes at post offices. At a press conference announcing the deal, the Deputy Postmaster General stated that FedEx and USPS are "interchangeable now." Matthew Weinstock, *Postal Service, FedEx Form Alliance*, Gov't Executive (online edition), Jan. 11, 2001, at

Accordingly, Mapu went to a nearby Federal Express office, and sent his notice of appeal to the CAVC using FedEx Priority Overnight service. App. 2a, 21a, 31a. The CAVC received Mapu's notice of appeal the next morning, 121 days after the BVA denied Mapu's claim for benefits. App. 2a, 31a. There is no question that the notice would have been timely filed if Mapu had just mailed it via USPS, even though it would have taken far longer to arrive.

The government moved to dismiss Mapu's appeal as untimely on the ground that he had filed it by Federal Express. Over Mapu's opposition, a single judge of the CAVC (Greene, J.) granted that motion on June 13, 2002. App. 28a-30a. Judge Greene first held that because Mapu's notice of appeal "does not bear a USPS postmark, [he] is not entitled to the benefit of the postmark rule," App. 30a, which deems notices of appeal filed on the date of any legible postmark affixed to the envelope containing the notice. 38 U.S.C. § 7266(c)(2). While acknowledging that Mapu had been "directed to use FedEx" by postal officials, App. 28a, Judge Greene asserted that "there is ... nothing in this appeal to suggest that tolling of the 120-day appeal period is permissible." App. 30a.

Mapu moved for rehearing by a three-judge panel of the CAVC, but that motion was denied on September 13, 2002. App. 25a-27a. In its decision, the panel agreed with Judge Greene that Mapu's notice of appeal was untimely under the statute, and likewise held that "controlling caselaw limits the application of equitable tolling to cases where [the Department of Veterans' Affairs'] conduct caused the late filing." App. 26a. The panel concluded by remarking "that if the USPS is ... contracting out functions, such as the delivery of overnight mail, the U.S. Congress may wish to consider

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http://www.govexec.com/dailyfed/0101/011101w1.htm (visited Nov. 1, 2005).

whether modifications to [the statute] are warranted in order to maintain the purpose sought by the postmark provision in that section." App. 26a.

Mapu timely appealed the panel's decision to the Federal Circuit. After he filed his opening brief, however, the government moved to vacate the CAVC panel's decision and remand for reconsideration in light of intervening Federal Circuit precedent. The Federal Circuit granted that motion over Mapu's opposition on May 1, 2003. App. 23a-24a.

On December 9, 2003, Judge Greene again dismissed Mapu's appeal. App. 13a-20a. As before, Judge Greene held that Mapu's notice of appeal was untimely and that Mapu was not entitled to equitable tolling because "no defective pleading was filed within the statutory deadline, and Mr. Mapu has alleged no misleading conduct on the part of the Secretary or his agents." App. 17a. Echoing the CAVC's earlier panel decision, Judge Greene acknowledged that "section 7266 fails to reflect the current reality, i.e., that a service such as FedEx may be at least as reliable as the USPS," and noted that the delivery partnership between the USPS and FedEx "could easily create confusion among consumers," but held that "the authority to amend statutes because of prudential concerns is not among the powers granted to this Court." App. 19a. Ultimately, he concluded, Mapu's remedy "lies with Congress, not with this Court." *Id.*

Mapu appealed Judge Greene's decision directly to the Federal Circuit, and on February 15, 2005, a three-judge panel of that court affirmed the CAVC's judgment. App. 1a-10a. Ironically, the Federal Circuit based its decision on the legislative history of provisions that *liberalized* the CAVC's statutory filing deadline by providing that notices of appeal sent through the U.S. mail are timely if postmarked within the 120-day appeals period. According to the court, because those provisions did not liberalize the statutory filing requirement even further—by

providing that notices of appeal *sent by Federal Express* are timely if dispatched within the 120-day appeals period—Congress implicitly precluded the application of equitable tolling in these circumstances. App. 9a ("We conclude ... that Congress' explicit decision not to broaden the postmark rule by extending it to delivery services other than the Postal Service must trump an extension of equitable tolling to this case.").

Mapu unsuccessfully sought panel rehearing and rehearing en banc. *See* App. 11a-12a. This petition follows.

REASON FOR GRANTING THE WRIT

The Federal Circuit Erred, And Created A Circuit Conflict, By Holding That Congress Implicitly Precludes Equitable Tolling By Providing One Or More Exceptions To A Particular Statutory Deadline.

The Federal Circuit erred by holding that Congress implicitly precluded equitable tolling with respect to veterans' appeals filed by Federal Express by not including such appeals within the scope of the "postmark" exception. *See* App. 9a. The fact that Congress did not include such appeals within that exception merely establishes that Mapu's appeal was untimely in the first place; it does not *further* establish that Congress implicitly precluded equitable tolling.

Were it true that Congress' decision to establish a particular statutory deadline (or to craft a particular exception to a deadline) implicitly precludes equitable tolling whenever a litigant misses the deadline (or falls outside that exception), the doctrine of equitable tolling would cease to exist. After all, Congress' choice of any deadline could always be construed as its rejection of another deadline (or no deadline at all). Thus, the Federal Circuit's expansive view of "implicit preclusion" has no logical stopping point: under that approach,

equitable tolling is inherently inconsistent with *any* statutory deadline.

As this Court has explained, however, "[i]t is hornbook law that limitations periods are customarily subject to equitable tolling, *unless tolling would be inconsistent with the text of the relevant statute*." *Young*, 535 U.S. at 49 (emphasis added; internal quotations omitted). That straightforward point should have been dispositive here. Nothing in the text (much less the structure or history) of 38 U.S.C. § 7266 remotely purports to preclude equitable tolling where a veteran files an untimely notice of appeal with the CAVC by Federal Express. All that can be said is that the statute is silent with respect to appeals filed by Federal Express rather than U.S. mail. While such silence may render such appeals untimely in the first place, it in no way suggests an intent to preclude equitable tolling with respect to such untimely appeals. Veterans who comply with the statute get a sure thing: their notices of appeal are timely. Veterans who do not comply with the statute, in contrast, must rely on equitable tolling, and thus must persuade the courts that the equities are on their side (as they plainly are here).

Given the pedigree of equitable tolling in our legal tradition, this Court has held the doctrine categorically inapplicable only where Congress' intention to preclude tolling is unmistakable on the face of a statute. That is true even with respect to litigation against the Government; indeed, the very holding of *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990), is that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States."

Thus, in *United States v. Brockamp*, 519 U.S. 347 (1997), this Court held that the presumption in favor of equitable tolling had been rebutted with respect to § 6511 of the Internal Revenue Code, because that provision "sets forth its time limitations in unusually emphatic

form," and thus differs sharply from typical limitations statutes. *Id.* at 350 ("§ 6511 ... sets forth its limitations in a highly detailed technical manner, that, linguistically speaking, cannot easily be read as containing implicit exceptions."); *see also id.* at 352 ("Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, *taken together*, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote.") (emphasis added). The Federal Circuit identified no such evidence of an intent to preclude equitable tolling in the veterans' appeal statute at issue here.

Similarly, in *United States v. Beggerly*, 524 U.S. 38 (1998), this Court started from the premise that equitable tolling is presumptively available in actions against the federal government. Only after highlighting certain distinctive features of the Quiet Title Act, 28 U.S.C. § 2409a(g), did the Court hold that the doctrine did not apply to claims under that statute. In particular, the Court noted that the statute (1) "already effectively allow[s] for equitable tolling," because the limitations period "will not begin to run until the plaintiff 'knew or should have known of the claim of the United States,'" (2) provides an "unusually generous [12-year] limitations time period," and (3) "deals with ownership of land [where it] is of special importance that landowners know with certainty what their rights are, and the period during which those rights may be subject to challenge." 524 U.S. at 48-49. Once again, the Federal Circuit identified no such distinctive features in the veterans' appeal statute at issue here.

This Court's subsequent decision in *Young* only underscores the extent of the Federal Circuit's departure from settled law. That case addressed the availability of equitable tolling under the "three-year lookback period" set forth in Sections 507(a)(8)(A)(i) and 523(a)(1)(A) of the Bankruptcy Code. As in its prior cases, this Court began

its analysis by emphasizing the presumptive availability of equitable tolling. *See Young*, 535 U.S. at 49. In holding that the relevant provisions of the Bankruptcy Code did *not* implicitly preclude equitable tolling, the Court highlighted two key features of the Code. First, it observed that tolling was especially appropriate in the bankruptcy context, given that the entire bankruptcy scheme is equitable in nature. *Id.* at 50; *see also id.* at 52 ("It would be quite reasonable for Congress to ... assum[e] that bankruptcy courts will use their inherent equitable powers to toll the federal limitations periods within the Code."). And second, the Court explained that the presence of a tolling provision within the same subsection that contained the lookback period—though not applicable to the lookback period itself—actually supported the view that tolling was available:

> If anything, [the tolling exception applicable to pending settlement offers] demonstrates that the Bankruptcy Code *incorporates* traditional equitable principles.... When [it] was enacted, it was IRS practice ... to stay collection efforts (if the Government's interests would not be jeopardized) during the pendency of [such offers]. Thus, a court would not have equitably tolled the 240-day lookback period..., since tolling is inappropriate when a claimant has voluntarily chosen not to protect his rights within the limitations period. Hence the tolling provision ... *supplements* rather than displaces principles of equitable tolling.

Id. at 53 (emphasis in original).

Both of those points bolster the conclusion that equitable tolling is available here. Like the bankruptcy scheme (but unlike the tax or real property laws in *Brockamp* and *Beggerly*), the veterans' benefits scheme is

inherently equitable in nature. *See, e.g.*, *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). And, just as in *Young*, the presence of an existing exception within § 7266 "*supplements* rather than displaces principles of equitable tolling," *Young*, 535 U.S. at 53 (emphasis in original), because it underscores Congress' concern with strict application of the 120-day deadline. *See* App. 7a-8a (noting that Congress enacted the "postmark rule" to abrogate decisions "dismiss[ing] the appeals of several veterans in which the notice of appeal had been postmarked by the 120-day deadline, but was not received by the Veterans Court within that time period.") (citing *Holliday v. Derwinski*, 2 Vet. App. 199, 199 (1992); *DiDonato v. Derwinski*, 2 Vet. App. 42, 43 (1991)). The fact that Congress did not liberalize the statutory deadline even further is hardly a reason to preclude equitable tolling. Nothing in the legislative history supports the Federal Circuit's conclusion that Congress somehow intended to preclude tolling with respect to appeals filed by any means *other* than the USPS. To the contrary, the legislative history does not mention equitable tolling at all.

The Federal Circuit's broad view of "implicit preclusion," moreover, conflicts not only with this Court's teachings but the decisions of other federal courts of appeals applying those teachings. Although the Federal Circuit's exclusive jurisdiction over appeals from the CAVC precludes a circuit conflict with respect to the specific statute at issue here, *see* 38 U.S.C. § 7292, the Federal Circuit's "implicit preclusion" analysis is squarely inconsistent with the analysis employed by these other circuits.

Thus, in *Chung v. Department of Justice*, 333 F.3d 273, 277 (D.C. Cir. 2003), the D.C. Circuit held that Congress did not implicitly preclude equitable tolling under the Federal Privacy Act, even though that statute included a specific equitable exception to its two-year limitations period. *See* 5 U.S.C. § 552a(g)(5) ("An action

to enforce any liability created under this section may be brought ... within two years from the date on which the cause of action arises, except that where an agency has materially and willfully misrepresented any information required ... to be disclosed ... and the information so misrepresented is material ..., the action may be brought at any time within two years after discovery ... of the misrepresentation.").

While acknowledging that the presence of "an express provision in the statute for tolling ... weighs against tolling for any reason not specified in the statute," *Chung*, 333 F.3d at 277, the D.C. Circuit noted that "*neither the Supreme Court nor any other court* has deemed that negative implication alone sufficient to defeat the presumption established in *Irwin*." *Id.* (emphasis added). To the contrary, *Beggerly* and *Brockamp* held that the relevant statutes had implicitly precluded equitable tolling based on "a combination of factors ... '*taken together*,'" *id.* at 277-78 (quoting *Brockamp*, 519 U.S. at 352) (emphasis added), including the statutes' "detail," "technical language," and "[re]iteration of the limitations," along with "administrative concerns" and context-specific policy considerations, like "the special importance of repose in the area of real property rights." *Id.* (citations and quotations omitted). Because those other features were "conspicuously absent from [the Privacy Act]," the D.C. Circuit held that "the Government has not overcome the *Irwin* presumption." *Id.* at 278.[2]

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[2] Because *Chung* overruled prior circuit precedent on this issue in light of this Court's subsequent decisions, it expressly noted that its "resolution of this issue has been approved by the entire court and thus constitutes the law of the circuit." 333 F.3d at 278 n.* (citing *Irons v. Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981)). The D.C. Circuit decided *Chung* on July 8, 2003, and denied the government's petition for rehearing *en banc* on October 3, 2003.

Likewise, in *Neverson v. Farquharson*, 366 F.3d 32, 40-41 (1st Cir. 2004), the First Circuit rejected claims that AEDPA's one-year limitation on habeas corpus petitions by state prisoners precludes equitable tolling even though it "set[s] out a variety of specific circumstances that will delay running of the statute." *See* 28 U.S.C. § 2244(d)(1) ("A 1-year period of limitation shall ... run from the latest of ... the conclusion of direct review or the expiration of the time for seeking such review; the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed ...; the date on which the constitutional right asserted was initially recognized by the Supreme Court ...; or the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.") (enumeration omitted).

While acknowledging that the argument for implicit preclusion was "forceful," the First Circuit concluded that the argument "reads too much into any negative inference that may reasonably be drawn from the exceptions." 366 F.3d at 41 (internal quotation omitted). Instead, the court held that the proper inference to be drawn from those exceptions is that "Congress intended to retain the flexibility afforded by the doctrine of equitable tolling." *Id.* And the First Circuit is not alone: every other federal circuit court to have considered equitable tolling under § 2244(d) has reached the same conclusion. *See, e.g.*, *McClendon v. Sherman*, 329 F.3d 490, 492 (6th Cir. 2003); *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803 (9th Cir. 2003); *Helton v. Dep't of Corr.*, 259 F.3d 1310, 1312 (11th Cir. 2001); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000); *Kreutzer v. Bowersox*, 231 F.3d 460, 463 (8th Cir. 2000); *Harris v. Hutchinson*, 209 F.3d 325, 329 (4th Cir. 2000); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999); *Miller v. New Jersey Dep't of Corr.*, 145 F.3d 616, 617-18 (3d Cir. 1998); *Davis v. Johnson*, 158 F.3d 806,

810-12 (5th Cir. 1998); *Miller v. Marr*, 141 F.3d 976, 978 (10th Cir. 1998);

Finally, in *Perez v. United States*, 167 F.3d 913 (5th Cir. 1999), the Fifth Circuit held that tolling was available under the Federal Tort Claims Act's two-year limitations period, 28 U.S.C. § 2401(b), even though that statute establishes two different triggers for its limitations period. *See* 167 F.3d at 917 ("[The FTCA statute] is a garden variety limitations provision, without the attention to detail in [Tax Code] § 6511 that suggested preemption of equitable remedies [in *Brockamp*].... By comparison [to § 6511], § 2401 makes just one distinction, between the time period generally applicable and that applicable if an agency issues a final denial of the claim."). Notably, *Perez* went out of its way to reject suggestions that "Congress's failure to amend the statute by adding tolling provisions, despite other amendments in 1948 and 1949, and despite adding a tolling provision for claims brought by the government in 1966, indicates a desire not to allow tolling in FTCA cases." *Id.* at 916. As the court explained, "deductions from congressional inaction are notoriously unreliable [and] are insufficient to overcome the presumption of *Irwin* that the government is subject to equitable tolling." *Id.* at 917.[3]

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[3] Numerous other federal appellate cases conflict with the Federal Circuit's reasoning in this case. *See, e.g., Hedges v. United States*, 404 F.3d 744, 748-50 (3d Cir. 2005) (holding equitable tolling available under the Suits in Admiralty Act, 46 App. U.S.C. § 745, because the statute "does not [already] incorporate equitable considerations," provides only two years in which to make claims, and allowing tolling would not create an undue administrative burden); *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1190-92 (9th Cir. 2001) (*en banc*) (applying equitable tolling to federal immigration regulations where the relevant text was "neither unusually emphatic ... nor ... as strong as the language of the time bar in the Federal Tort Claims Act, to

Because the decision below conflicts with decisions by this Court and other circuits, this Court should grant this petition, and either set this case for plenary review or summarily reverse the Federal Circuit's decision. A court may not always be able to apply the law in a way that *achieves* justice, but certainly a court should not go out of its way to apply the law in a way that *denies* justice. If ever there were a case where equitable tolling was appropriate, this is it. The Nation's veterans may not always encounter perfect justice in the judicial system, but at the very least they should not encounter an unforgiving citadel of technicality.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari, and either set the case for plenary review or summarily reverse the decision below.

Respectfully submitted,

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November 14, 2005

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which we have applied equitable tolling," where "the time period—ninety days—is not unusually generous [and does not] already account for tolling," and the existing regulatory exceptions "are less specific than those in *Brockamp*") (internal quotations omitted); *Clymore v. United States*, 217 F.3d 370, 374 (5th Cir. 2000) (holding that the six-year statute of limitations for bringing civil actions against the United States is subject to equitable tolling because the statute was not "highly-technical" and permitting tolling would not "create an administrative nightmare.").

APPENDIX

CONTENTS

United States Court of Appeals for the Federal Circuit

04-7088

JOHN MAPU, JR.,
Claimant-Appellant,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,
Respondent-Appellee.

DECIDED: February 15, 2005

Before RADER, Circuit Judge, ARCHER, Senior Circuit Judge, and BRYSON, Circuit Judge.

BRYSON, Circuit Judge.

This case arises from a missed filing deadline. Appellant John Mapu, Jr., is a United States Army veteran. He alleges that he sustained an injury during his service. He sought veterans' benefits for the injury, and when his request was denied, he appealed to the Board of Veterans' Appeals. The Board upheld the denial of benefits on July 31, 2001. The Board's opinion included a notice informing Mr. Mapu that if he wanted to appeal the decision, he had to file a notice of appeal with the Court of Appeals for Veterans Claims ("the Veterans Court") in Washington, D.C., within 120 days of that decision.

Acting pro se, Mr. Mapu went to a United States Post Office to mail his notice on November 28, 2001, which was the 120th day after the Board's decision. At that time, mail service to Washington, D.C., was disrupted due to

the anthrax crisis. A customer service supervisor and a manager at the Post Office told him that the Postal Service was not providing Overnight Express service to Washington, D.C. There is no suggestion that the Postal Service was not providing regular mail service to Washington, D.C. However, because Mr. Mapu wanted overnight delivery, the Postal Service representatives suggested that if he wanted to have his package delivered overnight, he should use a private carrier service. Mr. Mapu sent the notice by FedEx overnight delivery service. The Veterans Court received the notice the next day, which was 121 days after the Board's decision.

In a single-judge order, the Veterans Court dismissed Mr. Mapu's appeal for lack of jurisdiction because the notice of appeal was not received within 120 days of the Board's decision. Because Mr. Mapu had not mailed his notice of appeal within the 120-day period, the Court ruled that he was not entitled to the benefit of the "postmark rule" of 38 U.S.C. § 7266, which provides that a notice of appeal sent to the court through the Postal Service and having a legible postmark is deemed to have been filed with the Veterans Court on the date of the postmark. The court rejected Mr. Mapu's argument that the use of FedEx overnight delivery service should be equivalent to the use of the Postal Service for purposes of determining the filing date. The court also rejected Mr. Mapu's argument that the 120-day appeal period should be equitably tolled.

A three-judge panel of the Veterans Court affirmed the decision that Mr. Mapu's appeal was untimely and that he was ineligible for equitable tolling of the filing deadline. Mr. Mapu appealed that decision to this court, and we remanded the appeal to the Veterans Court for further review in light of our decisions in *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc), and *Santana-Venegas v. Principi*, 314 F.3d 1293 (Fed. Cir. 2002). On remand the Veterans Court found that *Jaquay* and *Santana-Venegas* were inapplicable to Mr. Mapu's

case and again concluded that Mr. Mapu's appeal was untimely. Mr. Mapu appeals that decision.

I

As a preliminary matter, Mr. Mapu argues that his notice of appeal was not untimely within the meaning of 38 U.S.C. § 7266. Subsection (a) of section 7266 states that in order to obtain Veterans Court review of a decision by the Board of Veterans' Appeals, "a person ... shall file a notice of appeal with the Court within 120 days." Subsection (b) allows a person to file that notice of appeal "by delivering or mailing the notice to the Court." Mr. Mapu contends that the phrase "delivering or mailing" encompasses the act of depositing his notice of appeal with FedEx for delivery. Because he deposited his notice with FedEx within 120 days of the Board decision, Mr. Mapu argues that he fulfilled the requirements of section 7266 regardless of when the Veterans Court received the notice.

Mr. Mapu's construction of the term "delivering" is belied by subsections (c) and (d) of section 7266. Section 7266(c) states that a notice of appeal shall be deemed to be received by the Veterans Court "[o]n the date of receipt by the Court, if the notice is delivered." If the notice is mailed, section 7266(c) states that the notice is deemed to have been received by the Veterans Court on the date of its postmark. Section 7266(d) elaborates on the postmark rule, stating the requirements and procedures used to determine whether a postmark is sufficient for a notice of appeal to be considered filed. Under Mr. Mapu's broad interpretation of section 7266(b), a veteran would meet the filing deadline the instant the notice of appeal was deposited with a common carrier. It would be irrelevant in Mr. Mapu's view when the Veterans Court actually received the notice, which would make subsections (c) and (d) meaningless. As we discuss below, Congress added subsections (c) and (d) in an effort to liberalize the time requirement for filing a notice of appeal. That legislation

would have been unnecessary if sections 7266(a) and (b) already treated filing as complete when the notice of appeal was deposited with the Postal Service or a private courier service. Given the structure of section 7266 and its legislative history, we decline to interpret subsections (a) and (b) in a way that would read subsections (c) and (d) out of the statute. Therefore, we hold that for an appeal to be timely, the Veterans Court must receive the notice of appeal within 120 days of the Board's decision, or the notice must be deemed received within 120 days of the Board's decision pursuant to the postmark rule of sections 7266(c) and (d). Because Mr. Mapu did not comply with either requirement, we agree with the Veterans Court that his appeal did not satisfy the timeliness requirement of section 7266.

II

Even if his appeal is otherwise untimely, Mr. Mapu argues that he is entitled to have the filing deadline equitably tolled. In support of that contention, he notes (1) that he actively pursued his right to appeal; (2) that he was unaware that he might lose his right of appeal by delivering the notice by FedEx rather than through the Postal Service; and (3) that filing his notice by FedEx was equivalent to filing a defective pleading, which can give rise to equitable tolling under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). For the reasons given below, we conclude that equitable tolling is unavailable on the facts of this case.

A

As an initial matter, the government contends that we lack jurisdiction to review the Veterans Court's determination that equitable tolling is inappropriate in this case. The government contends that the Veterans Court's decision is either a factual determination or an application of law to the facts of a particular case and that our review is therefore barred by 38 U.S.C. ¶ 7292(d)(2). That argument is without merit. In *Jaquay*, we were

presented with the same argument that we lacked jurisdiction because the case concerned the application of the law of equitable tolling to the facts. 304 F.3d at 1289. We rejected that argument, noting that "our holding resolves a contested interpretation of the Veterans Court's jurisdictional statute, 38 U.S.C. § 7266." *Id.* We have consistently held that "when the material facts are not in dispute and the adoption of a particular legal standard would dictate the outcome of the equitable tolling claim, this court has treated the question of the availability of equitable tolling as a matter of law that we are authorized by statute to address." *Bailey v. Principi*, 351 F.3d 1381, 1384 (Fed. Cir. 2003), citing *Jaquay*, 304 F.3d at 1289. Mr. Mapu's case is similar to *Jaquay* in that regard, and we therefore have jurisdiction over his appeal. Accordingly, we turn to the merits of Mr. Mapu's equitable tolling claim.

B

The Supreme Court stated in Irwin that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 48 U.S. at 95-96. The Court then listed two settings in which equitable tolling had been recognized in private law suits, namely "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 96. The Court's opinion does not, however, suggest that those two settings were the only ones in which equitable tolling would be appropriate. *See Nunnally v. MacCausland*, 996 F.2d 1, 5 n.7 (1st Cir. 1993) ("A fair reading of Irwin, however, shows that the Court did not undertake an exhaustive list of factors that may be considered in the equitable weighing process."). We have recognized that equitable tolling of the deadline in 38 U.S.C. § 7266 is allowed "in a variety of circumstances," *Barrett v. Principi*, 363 F.3d 1316, 1318

(Fed. Cir. 2004), and we have not limited equitable tolling of the 120-day appeal deadline to cases falling within the two examples cited in Irwin. *See Barrett*, 363 F.3d at 1318 (equitable tolling is available during a period when the veteran was mentally incapacitated); *Brandenburg v. Principi*, 371 F.3d 1362, 1364 (Fed. Cir. 2004) (equitable tolling is available when the veteran files the notice of appeal with the Board rather than with the Veterans Court); *Bailey v. Principi*, 351 F.3d at 1385 (equitable tolling is available when the veteran files the notice of appeal at the wrong location, using an incorrect form); *Santana-Venegas*, 314 F.3d at 1298 (equitable tolling is available when the veteran files the notice of appeal with the regional office rather than with the Veterans Court); *see also Jaquay*, 304 F.3d at 1289 (equitable tolling is available when the veteran misfiles a motion for Board reconsideration with the regional office rather than with the Board).

In ruling on Mr. Mapu's claim of equitable tolling on remand, the Veterans Court looked to whether the facts of Mr. Mapu's appeal fell within the two examples set forth in *Irwin* or within the facts of *Santana-Venegas* and *Jaquay*. The court concluded that *Santana-Venegas* and *Jaquay* did not apply because Mr. Mapu did not file his notice with the regional office; the court held that Irwin was inapplicable because Mr. Mapu did not file a defective pleading and he did not allege any agency employee had engaged in misconduct that caused him to miss the filing deadline.

In applying the equitable tolling doctrine, we have rejected the approach of looking to whether a particular case falls within the facts specifically identified in *Irwin* or one of our prior cases. In *Barrett*, for example, we considered whether a veteran's mental illness can excuse the untimely filing of his appeal. 363 F.3d at 1318. The government argued that equitable tolling under section 7266 was limited to specific factual circumstances listed in *Irwin*. We rejected that argument, noting that "[a]

careful study of Supreme Court precedent" directs otherwise. *Id.* We again reject the suggestion that equitable tolling is limited to a small and closed set of factual patterns and that equitable tolling is precluded if a veteran's case does not fall within those patterns. Such a conclusion would run counter to our holding that "requiring ruthless application of the time limit [of section 7266] is somewhat arbitrary." *Bailey v. West*, 160 F.3d 1360, 1364 (Fed. Cir. 1998) (en banc).

Irwin provides guidance as to the proper analysis in determining whether equitable tolling is appropriate. The first question is whether equitable tolling is available in private litigation with similar circumstances, recognizing that equitable tolling does "not extend to what is at best a garden variety claim of excusable neglect." *Irwin*, 498 U.S. at 95-96. The second question is whether Congress has either provided or intended that equitable tolling be unavailable in the situation at issue. *Id.*

C

The 120-day deadline of section 7266 was established in 1988 as part of the Veterans Judicial Review Act, Pub. L. No. 100-687, Div. A, § 301(a), 102 Stat. 4105, 4113 (1988). That statute gave the Veterans Court authority to establish rules governing the filing of appeals. In 1991, the Veterans Court published its Rules of Practice and Procedure, Rule 4 of which required that the Veterans Court actually receive a notice of appeal within 120 days for it to be timely. *In Re: Rules of Practice and Procedure*, 1 Vet. App. XXIX, XXXII (May 1, 1991). The Veterans Court subsequently dismissed the appeals of several veterans in which the notice of appeal had been postmarked by the 120-day deadline, but was not received by the Veterans Court within that time period. *See, e.g., Holliday v. Derwinski*, 2 Vet. App. 199, 199 (1992); *DiDonato v. Derwinski*, 2 Vet. App. 42, 43 (1991). At least

one such dismissal was upheld by this court. *See Espelito v. Derwinski*, 958 F.2d 1052, 1053 (Fed. Cir. 1992).

In response to those decisions, Congress amended section 7266 by adding the postmark rule to permit a notice of appeal that was mailed via the Postal Service to be deemed filed on the date of the postmark. *See* Veterans' Benefits Improvements Act of 1994, Pub. L. No. 103-446, § 511(a), 108 Stat. 4645, 4670. Statements made by members of Congress at that time clearly indicate that they believed the Veterans Court had previously been correct in requiring that the court actually receive a notice of appeal within 120 days, regardless of when or how the notice was sent. Senator Rockefeller, one of the sponsors of the 1994 legislation, explained that "the [Veterans Court] acted appropriately and within the scope of its authority when it adopted Rule 4." 139 Cong. Rec. 24,712 (1993). He explained, however, that the 1994 legislation adopting the postmark rule was designed to mitigate the harshness of Rule 4 as applied to veterans whose mail was delayed or who lived far from Washington, D.C. *Id.*.

It is clear that Congress wanted the postmark rule to apply only to a notice of appeal that was mailed using the Postal Service. The Joint Explanatory Statement for one of the related bills that proposed to amend section 7266 explained that the postmark rule would not be broadly applicable, but that only "legible United States Postal Service postmarks would be sufficient." 140 Cong. Rec. 28,849 (1994); *see also id.* at 28,840 (containing Senator Rockefeller's summary of the major provisions of H.R. 4386). The Joint Explanatory Statement further stated that "if a [notice of appeal] is delivered to the Court (for example, by private courier or delivery service), it would be considered timely filed if it is received by the Court within the 120-day limit established by Congress." 140 Cong. Rec. 28,849 (1994). The intention to limit the waiver of sovereign immunity to the strict confines of the postmark rule is further manifested in the provisions of

sections 7266(c) and (d), which clearly state that a Postal Service postmark is necessary for the postmark rule to apply. In short, it is clear that Congress was aware that the Veterans Court required actual receipt of the notice of appeal and specifically limited the exception created by the postmark rule to notices of appeal sent through the Postal Service. Thus, notices of appeal delivered by other means were specifically excluded from the application of the new statute.

Mr. Mapu asks that we use equitable tolling to broaden the waiver of sovereign immunity in exactly the way that Congress refused to—by in effect extending the postmark rule to a package sent using FedEx. We conclude, however, that Congress's explicit decision not to broaden the postmark rule by extending it to delivery services other than the Postal Service must trump an extension of equitable tolling to this case. In sum, equitable tolling is unavailable in a case such as this one, in which the veteran's only excuse for a late filing of the notice of appeal is that a delivery service other than the Postal Service was used.

III

Finally, we reject Mr. Mapu's contention that the Board's Appeals Notice informing him of his appeal rights was defective. Mr. Mapu claims that the notice failed to provide him with "an explanation of the procedure of obtaining review," as required by 38 U.S.C. § 5104(a), because it did not explain the postmark rule and did not advise him that he might lose his appeal rights if he sent the notice of appeal by a private courier service instead of the Postal Service. However, we have previously held that section 5104(a) "requires nothing more than the Appeals Notice provides, *viz.*, a general outline of the available procedures for obtaining review of a final Board decision." *Cummings v. West*, 136 F.3d 1468, 1472 (Fed. Cir. 1998), *overruled on other grounds by Bailey v. West*, 160 F.3d 1360, 1368 (Fed. Cir. 1998). In this case, the

Board's Appeals Notice apprised Mr. Mapu of his right to appeal, the 120-day deadline for the appeal, and the address of the Veterans Court. Furthermore, the Appeals Notice advised him that he could direct any questions to the Veterans Court about the "procedure by which you may file your Notice of Appeal." Because the notice provided the "general outline of the available procedures for obtaining review," as required by section 5104, it was not insufficient.

Each party shall bear its own costs for this appeal.

AFFIRMED.

United States Court of Appeals for the Federal Circuit

04-7088

JOHN MAPU, JR.,
Claimant-Appellant,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,
Respondent-Appellee.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on June 23, 2005.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: June 16, 2005

cc: Michael D. Shumsky
William K. Olivier

MAPU V DVA, 04-7088
(CVA – 01-2028)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 01-2028

JOHN MAPU, JR., APPELLANT,

V.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENE, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On November 29, 2001, veteran John Mapu, Jr., then pro se, filed a Notice of Appeal (NOA) from a July 31, 2001, Board of Veterans' Appeals (Board) decision. Mr. Mapu's NOA was delivered to the Court by Federal Express (FedEx) 121 days after the Board mailed its decision. The Secretary moved to dismiss the appeal for lack of jurisdiction, asserting that Mr. Mapu had filed an untimely NOA. On June 31, 2002, the Court granted the Secretary's motion and dismissed the appeal for lack of jurisdiction. The Court then denied Mr. Mapu's motion for a panel decision and entered its judgment on August 22, 2002.

Mr. Mapu appealed the Court's decision to the United States Court of Appeals for the Federal Circuit (Federal Circuit). On April 29, 2003, the Federal Circuit remanded Mr. Mapu's appeal to this Court for further review in light of the Federal Circuit's decisions in *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc), and

Santana-Venegas v. Principi, 314 F.3d 1293 (Fed. Cir. 2002). In *Jaquay*, the Federal Circuit held that a claimant's request for reconsideration by the Board, misfiled with the same VA regional office (RO) from which the claimant's claim originated, equitably tolled the judicial appeal period for filing an NOA to this Court. *Jaquay*, 304 F.3d at 1289. The Federal Circuit reasoned that the availability of equitable tolling should be interpreted liberally with respect to filings during the nonadversarial stage of the veterans benefits process. *Id.* at 1286. Moreover, it observed that the statute and regulations governing motions for reconsideration did not preclude equitable tolling while motions for reconsideration are pending. *Id.*

In *Santana-Venegas*, the Federal Circuit held that an NOA misfiled, within the 120-day judicial appeal period, with the RO where the veteran's claim originated, equitably tolled the judicial appeal period for filing an NOA with this Court. *Santana-Venegas*, 314 F.3d at 1298. In that case, the Federal Circuit interpreted an appellant's appeal to this Court to be an action within the nonadversarial process within the agency, and as part of the appellant's attempt to seek redress from the Secretary. *Id.* at 1297-98. *But see Abbs v. Principi*, 237 F.3d 1342, 13446-48 (Fed. Cir. 2001) (specifically rejecting argument that this Court is either an agency or "indistinguishable" from the Secretary). In both cases, however, the Federal Circuit, citing *Young v. United States*, 535 U.S. 43, 122 S.Ct. 1036, 1040 (2002), recognized that limitations periods are customarily not subject to equitable tolling if tolling would be inconsistent with the text of the relevant statute. *Santana-Venegas*, 314 F.3d at 1296; *Jaquay*, 304 F.3d at 1286 (citing *United States v. Beggerly*, 524 U.S. 38, 48 (1998)).

In an order dated May 15, 2003, the Court invited the parties to file supplemental argument regarding the Court's jurisdiction to review this matter. On June 16, 2003, both the Secretary and Mr. Mapu, through counsel,

filed their responses to the Court's order. On June 30, 2003, Mr. Mapu filed both a motion for leave to file a reply to the Secretary's response and a copy of said reply. The Court will grant Mr. Mapu's motion and his reply will be filed as of the date of this order.

Mr. Mapu argues that he, like the appellants in *Jaquay* and *Santana-Venegas*, exercised due diligence in bringing his NOA before this Court. Appellant's (App.) Response (Resp.) at 4. He argues that he attempted to use the overnight service of the United States Postal Service (USPS), but was advised that overnight service was not available to the Washington, D.C., area because of the anthrax crisis that was disrupting USPS mail service at that time, and that only thereafter did he resort to sending his NOA to the Court via FedEx. *Id.* at 5. He argues that he "should not [be] punished for choosing a more expeditious manner of sending his [NOA] to the Court." *Id.* at 13. Alternatively, he argues that nothing in section 7266 of title 38, U.S. Code, requires that the Court actually receive the NOA within the appeal period. App. Resp. at 5. He argues that section 7266(a) only requires that the NOA be "file[d]" within the appeal period; section 7266(b) provides that an NOA is filed by "delivering or mailing the notice to the Court"; neither section requires that the Court actually receive the NOA within the appeal period; and that although section 7266(c) and (d) define when an NOA will be deemed to be received by the Court, "the statute does not set forth the significance of the 'received' date." *Id.*

The Secretary contends that this case differs from *Jaquay* because here the matter involves the filing or receipt of an NOA filed with the Court and not with VA, and is not a motion for reconsideration within the agency as in *Jaquay*. Secretary's Resp. at 2. Further, the Secretary argues that this case is also unlike *Santana-Venegas* because Mr. Mapu's NOA is not considered a defective filing or a misfiling with the RO. *Id.* at 3. Here, he filed the NOA with the Court but failed to file it within

the 120-day appeal period. *Id.* Thus, the Secretary contends that because the NOA was received by the Court 121 days after the mailing of the notice of the Board's decision, the Court does not have jurisdiction and the appeal should be dismissed. *Id.* at 3-4.

This Court's jurisdiction derives exclusively from statutory grants of authority provided by Congress and may not be extended beyond that permitted by law. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). The ultimate burden of establishing jurisdiction rests with the appellant. *See McNutt v. G.M.A.C.*, 298 U.S. 178 (1936); *Bethea v. Derwinski*, 2 Vet.App. 252 (1992). To be timely under Rule 4 of this Court's Rules of Practice and Procedure (Rules) and precedents construing 38 U.S.C. § 7266(a), an NOA must be filed with the Court within 120 days after the Board decision is mailed to an appellant. An NOA will be considered received by the Court: (1) On the date of receipt by the Court, if the notice is delivered or (2) on the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if properly addressed and mailed. *See* 38 U.S.C. § 7266(c)(1), (2).

In *Lariosa v. Principi*, the Court observed that Congress has adopted a postmark rule only as to a postmark affixed by the USPS. *See Lariosa*, 16 Vet. App. 323, 328-29 (2002). Therefore, in that case, the Court held that there was no basis to equitably toll a Congressionally imposed filing deadline (the 120-day judicial appeal period) based upon mailing an NOA from a foreign residence via a foreign postal service. *Id.* at 327-29. The Court also held that it was not a violation of the Equal Protection Clause of the 14th amendment to the U.S. Constitution for Congress to limit the postmark rule in section 7266 to a USPS postmark. *Id.* at 329.

The NOA is this appeal was mailed to the Court via FedEx. Because the cover in which Mr. Mapu's NOA is

mailed does not bear a USPS postmark, the postmark rule in section 7266(c) may not be used to establish when it was received by the Court. Rather, his NOA must be considered received by the Court on the date actually delivered to the Court. *See Lariosa v. Principi*, 16 Vet.App. 323 (2002). Mr. Mapu's argument that the 120-day filing deadline should be equitably tolled because he acted with diligence in attempting to submit his NOA in a timely manner by sending it through FedEx is not persuasive. Equitable tolling may be available against the United States under two prongs: (1) "[W]here the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or [(2)] where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) (footnotes omitted).

Neither of the two prongs of *Irwin* are applicable to the facts of this case because no defective pleading was filed within the statutory deadline, and Mr. Mapu has alleged no misleading conduct on the part of the Secretary or his agents. Mr. Mapu urges that his failure to file in a timely manner should be excused because he intended to use the USPS to send his filing, but chose FedEx because he believed it would be more expedient. This amounts to "at best a garden variety claim of excusable neglect" to which the principles of equitable tolling do not extend. *See Irwin, supra*. Furthermore, unlike in *Santana-Venegas, supra*, there is no evidence that Mr. Mapu misfiled his NOA with an RO. Lastly, the Court notes that whereas *Jaquay* and *Santana-Venegas* involved situations where VA failed to forward with dispatch the misfiled documents, here VA was not involved in the delay. *See Santana-Venegas*, 314 F.3d at 1296 (nothing that, 70 days after receipt of appellant's misfiled NOA, RO advised him that he should have filed NOA with Court); *Jaquay*, 304 F.3d at 1279 (nothing that approximately 10 months had passed between RO's

receipt of misfiled motion for reconsideration and when it forwarded document to Board). As the Federal Circuit stated in *Jaquay*, "although the doctrine of equitable tolling gives courts some latitude in excusing the missing of filing deadlines, an appeal by a veteran of a BVA decision involves a waiver of sovereign immunity, which must be strictly interpreted." *Jaquay*, 304 F.3d at 1283 (citing *United States v. Sherwood*, 312 U.S. 584, 590 (1941)).

As to Mr. Mapu's alternative argument, the creative reading of the statutory scheme he urges this Court to adopt is wholly without support in the law. Under Rule 4(a), which Mr. Mapu fails to cite in his response, an NOA "must be *received* by the Clerk not later than 120 days after the date on which the Board mailed notice of the decision" (emphasis added). Mr. Mapu presents no arguments as to why this Rule should be considered invalid, or as to why this Rule conflicts with the statutory scheme. Furthermore, even a cursory glance at the statute reveals that the reading that he urges, which would separate "filing" from any notion of receipt of the NOA by the Court, is impossible to reconcile with any generally accepted tenet of statutory construction. To note only the most glaring deficiencies in his argument, this reading would (1) lead to the absurd result under section 7266(b) and (c)(1) where an appellant could "file" the NOA with the Court by "delivering...the notice to the Court," but where "delivery" doesn't entail "receipt" by the Court; and (2) render section 7266(c)(2) and (d) surplusage, by rendering "receipt" by the Court to be of no legal significance. The Court will not adopt such an argument so obviously at odds with the intentions of the statute.

Although the Court is sympathetic to Mr. Mapu's arguments, the appeals notice provided to him by the Secretary indicates that he was fully advised of his appellate rights in accordance with 38 U.S.C. § 5104. *See Cummings v. West*, 136 F.3d 1468, 1470 (Fed. Cir. 1998)

(concluding that the Secretary's appeals notice satisfies the requirements of section 5104(a)). It is perhaps arguable that, in limiting itself to USPS postmarks only section 7266 fails to reflect the current reality, i.e., that a service such as FedEx may be at least as reliable as the USPS. Indeed, the USPS has recently lauded the "reliability" of FedEx in discussing its contractual transportation alliance with FedEx (whereby FedEx took on air transportation of a set quantity of USPS mail, as of January 2002). *See Setting the Record Straight*, USPS Public Affairs and Communications, August 30, 1992, *at* http://www.usps.com/news/fyi/postcom2_response.htm (last visited Nov. 19, 2003); *Compliance with Statutory Policies, Fundamental Service to the People, at* http://www.usps.com/history/cs02/1a.htm (last visited Nov. 19, 2003). Furthermore, the USPS and FedEx "also have a retail agreement which enables FedEx to place its collection boxes at designated Postal Service facilities." *Compliance with Statutory Policies, Postal Service Facilities, Equipment, and Employee Working Conditions*, ¶ 4.e, *at* http://www.usps.com/history/cs02/1f4.htm (last visited Nov. 19, 2003). These arrangements could easily create confusion among consumers of postal products as to whether the USPS has placed its imprimatur on FedEx services. However, the authority to amend statutes because of prudential concerns is not among the powers granted to this Court. Should Mr. Mapu wish to press such concerns, his remedy lies with Congress, not with this Court.

There is otherwise nothing in this appeal to suggest that tolling the 120-day appeal period would be appropriate. Therefore, the Court concludes that Mr. Mapu has not met the burden of demonstrating that an NOA was filed within 120 days after the date of mailing of the Board decision.

On consideration of the foregoing, it is

ORDERED that Mr. Mapu's motion for leave to file a reply to the Secretary's June 16, 2003, response is granted. The Clerk will file Mr. Mapu's reply as of the date of this order. It is further

ORDERED that this appeal is DISMISSED for lack of jurisdiction.

DATED: Dec - 9 2003 BY THE COURT:

WILLIAM P. GREENE, JR.
Judge

Copies to:

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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

JOHN MAPU, JR.,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,
Respondent-Appellee.

No. 01-2028

Declaration of Saline M. Lampe

The undersigned, Ms. Saline M. Lampe, does hereby declare and say as follows:

1. I am an employee of the United States Postal Service ("USPS"). My present position is Supervisor: Customer Service. On November 28, 2001, my position was Supervisor: Customer Service.

2. I am the sister of the Claimant-Appellant John Mapu, Jr. ("Mr. Mapu").

3. On November 28, 2001, Mr. Mapu came to the postal facility where I was working to mail his appeal of the July 31, 2001 Board of Veterans' Appeals decision to the United States Court of Appeals for Veterans Claims in Washington, D.C.

4. Mr. Mapu told me that he wanted to send his appeal by overnight mail.

5. At that time, mail delivery to Washington, D.C. was disrupted because of the anthrax crisis.

5 [*sic*]. It was my understanding that the USPS was not providing Overnight Express Mail service to Washington, D.C. I therefore asked my Manager, William Basile, how Mr. Mapu could send his appeal

overnight to Washington, D.C. He confirmed my understanding that he could not use the USPS for overnight delivery to Washington, D.C. Because the USPS was partnering with FedEx, he suggested that the appeal be sent using FedEx.

6. I therefore went on that same day with Mr. Mapu to a nearby FedEx office, and sent the appeal by FedEx's Priority Overnight service to the United States Court of Appeals for Veterans Claims, 625 Indiana Ave., N.W., Suite 900, Washington, D.C. 20004, and to Notice of Appeal, VA General Counsel (027), 810 Vermont Avenue, N.W., Washington, D.C. 20420.

7. I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 12, 2003.

Saline M. Lampe

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public order.

United States Court of Appeals for the Federal Circuit

03-7015

JOHN MAPU, JR.,
Claimant-Appellant,

v.

R. JAMES NICHOLSON,
Secretary of Veterans Affairs,
Respondent-Appellee.

ON MOTION

Before NEWMAN, BRYSON, AND DYK, Circuit Judges.

BRYSON, Circuit Judge.

ORDER

The Secretary of Veterans Affairs moves to waive the requirements of Fed. Cir. R. 27(f) and vacate the Court of Appeals for Veterans Claims September 13, 2002 order and remand this case to the Court of Appeals for Veterans Claims for further proceedings. John Mapu, Jr. opposes.

The Secretary states that the matter should be remanded because the Court of Appeals for Veterans Claims did not have the benefit of our decisions in *Jaquay v. Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc), and *Santana-Venegas v. Principi*, 314 F.3d 1293 (Fed. Cir. 2002), at the time it ruled on the timeliness of Mapu's notice of appeal and the availability of equitable tolling. In view thereof, the court remands to afford the Court of

Appeals for Veterans Claims an opportunity to conduct further proceedings in light of *Jaquay* and *Santana-Venegas*.

Accordingly,

IT IS ORDERED THAT:

The motions are granted

FOR THE COURT

4 –29–03

William C. Bryson
Circuit Judge

cc: Courtenay C. Brinckerhoff, Esq.
Leslie C. Cayer-Ohta, Esq.

ISSUED AS MANDATE: May - 1 2003

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 01-2028

JOHN MAPU, JR., APPELLANT,

V.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before KRAMER, *Chief Judge*, and STEINBERG and GREENE, *Judges*

ORDER

On June 13, 2002, the Court, in a single-judge order, dismissed this appeal for lack of jurisdiction because the appellant had not filed a Notice of Appeal (NOA) within the 120 day judicial-appeal period. *See Mapu v. Principi*, No.01-2028, 2002 WL 1926515 (Vet. App. June 13, 2002) (attached as appendix for explanatory purposes). On July 2, 2002, the appellant, through counsel, filed a motion for a panel decision.

In his motion for a panel decision, the appellant argues that his NOA, received via FedEx (formerly known as Federal Express), should be deemed timely because the Court was "'inaccessible' due to an act of war which had disabled the [United States Postal Service (USPS)] and inhibited the normal delivery of mail in the United States," and states that the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) has deemed itself inaccessible due to USPS mail disruption. Appellant's July 2, 2002, Opposed Motion for Panel Consideration at 1-2. The Court notes that Rule 26(a)(3) of the Federal Rules of Appellate Procedure provides the Federal Circuit

with the authority to deem its clerk's office inaccessible, whereas this Court's Rules of Practice and Procedure (Rules) provide no such authority. *Compare* FED. R. APP. P. 26(a)(3) (excluding from filing period day "on which the weather or other conditions make the clerk's office inaccessible"), *with* U.S. VET. APP. R. 26(a)(1) (addressing computing time periods set by Court's rules, but containing no such exclusion).

Moreover, controlling caselaw limits the application of equitable tolling to cases where VA conduct caused the late filing–a situation not presented here. *See Bailey v. West*, 160 F.3d 1360, 1365 (Fed. Cir. 1998) (en banc) (holding equitable tolling principles applicable where VA's conduct misled claimant into "allowing the filing deadline to pass"); *Smith (William) v. West*, 13 Vet. App. 525,.528-29 (2000); *Evans v. West*, 12 Vet. App. 396, 399 (1999). Furthermore, under 38 U.S.C. § 7266(c)(2) and (d), and Rule 4(a)(1) of the Court's Rules, when an NOA is mailed via the USPS, it does not need to be received by the last day of the judicial-appeal period in order to be considered timely filed; rather, the NOA will be deemed timely if the envelope in which it was mailed bears a USPS postmark dated on or before the last day of the judicial appeal period. 38 U.S.C. § 7266(c)(2), (d); U.S. Vet. App. R. 4(a)(1). Given that the Court's Rules do not provide for deeming the Court "inaccessible", that the appellant did not send his NOA via USPS, and that his NOA was not received within the 120-day judicial-appeal period, there exists no basis for finding it timely. *See* 38 U.S.C. § 7266(c)(2), (d); *Bailey*, *Smith (William)*, and *Evans*, all *supra*; U.S. Vet. App. R. 4(a)(1), 26(a)(1). Accordingly, the Court will deny his motion for a panel decision. The Court notes that if the USPS is, in certain locations, contracting out functions, such as the delivery of overnight mail, the U.S. Congress may wish to consider whether modifications to section 7266 are warranted in order to maintain the purpose sought by the postmark provision in that section.

Upon consideration of the foregoing, it is

ORDERED that the appellant's motion for a panel decision is DENIED.

DATED: Sep 13 2002 PER CURIAM.

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 01-2028

JOHN MAPU, JR., APPELLANT,

V.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before GREENE, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

On November 29, 2001, Mr. John Mapu, Jr., filed, pro se, a Notice of Appeal (NOA) from a July 31, 2001, Board of Veterans' Appeals (Board) decision. Mr. Mapu's NOA was delivered to the Court by Federal Express (FedEx) 121 days after the Board mailed its decision. The Secretary later moved to dismiss the appeal for lack of jurisdiction, asserting that Mr. Mapu had filed an untimely NOA. On February 25, 2002, Mr. Mapu filed, through counsel, an opposition to the Secretary's motion to dismiss. He argues that the claims file contains no evidence that July 31, 2001, is the date the Board's decision was mailed to both the appellant and his representative. Further, Mr. Mapu argues that he complied with the law by delivering his NOA to FedEx on November 28, 2001. He asserts that during the time he forwarded the NOA, the U.S. Postal Service (USPS) had suspended overnight delivery to the Washington, D.C. area. Thus he was directed to use FedEx.

This Court's jurisdiction derives exclusively from statutory grants of authority provided by Congress and may not be extended beyond that permitted by law. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). The ultimate burden of establishing jurisdiction rests with the appellant. *See McNutt v. G.M.A.C.*, 298 U.S. 178 (1936); *Bethea v. Derwinski*, 2 Vet.App. 252 (1992). In order to obtain review by this Court of a final Board decision, an appellant must file a timely NOA. 38 U.S.C. § 7266(a). To be timely under Rule 4 of this Court's Rules of Practice and Procedure and precedents construing 38 U.S.C. § 7266(a), an NOA must be filed with the Court within 120 days after notice of the Board decision is mailed to an appellant.

Mr. Mapu's appeal was processed in the normal course of business, a process that is entitled to the presumption of administrative regularity in the absence of evidence to the contrary. *Clark v. Principi*, 15 Vet.App. 61, 63 (2001); *Davis v. Brown*, 7 Vet.App. 298, 300 (1994); *Ashley v Derwinski*, 2 Vet.App. 307, 208-09 (1992). *See also Morris v. Sullivan*, 897 F.2d 553, 560 (D.C.Cir. 1990) (citing *United States v. Chem. Found.*, 272 U.S. 1, 14-15 (1926), for proposition that "presumption of regularity" supports official acts of public officers, and in absence of clear evidence to contrary, courts presume that they have properly discharged their official duties). Although Mr. Mapu maintains that the claims file contains no evidence that the Board decision was mailed on the date that it was issued, in the absence of any evidence showing a mailing date other than the date recorded on the decision, it is presumed that the Board decision was, in fact, mailed to both the appellant and his representative on July 31, 2001. *See Clark* and *Ashley*, both *supra*. Mr. Mapu's mere allegation is insufficient to rebut the presumption that copies of the Board decision were properly mailed. *See, e.g., Mindenhall v. Brown*, 7 Vet.App. 271, 274 (1994) (holding that statement of nonreceipt, standing alone, is

not the type of "clear evidence to the contrary" sufficient to rebut the presumption of regularity).

In addition, as noted above, the NOA in this appeal was delivered to the Court via FedEx on November 29, 2001. Rule 4 of the Court's Rules of Practice and Procedure states that an NOA shall be deemed received (1) on the date of its legible postmark, affixed by the USPS, if the mailing is properly addressed to the Court and is mailed; or (2) "on the date of its receipt by the Clerk, if it does not bear a legible postmark affixed by the [USPS], *or it is delivered or sent by a means other than United States mail.*" U.S. Vet. App. R. 4(a)(2) (emphasis added). Because this NOA does not bear a USPS postmark, Mr. Mapu is not entitled to the benefit of the postmark rule. Rather, his NOA must be deemed received on the date it was actually received by the Court. Mr. Mapu's argument that delivery by FedEx is the same as mailing by USPS for purposes of interpreting the mailbox rule is contrary to both statute, *see* 38 U.S.C. § 7266(a)(3), and this Court's Rules.

Because there is otherwise nothing in this appeal to suggest that tolling of the 120-day appeal period is permissible, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990); *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998), the Court concludes that Mr. Mapu has not met the burden of demonstrating that an NOA was filed within 120 days after the date of mailing of notice of the Board decision.

On consideration of the foregoing, it is

ORDERED that the Secretary's motion is granted and this appeal is DISMISSED for lack of jurisdiction.

DATED: Jun 13 2002 BY THE COURT:

WILLIAM P. GREENE, JR.,
Judge

Sean A. Ravin
1429 G. Street NW Suite 256
Washington, D.C. 20005

To Whom it may concern,

During the aftermath of the September 11th, 2001 Tragedy and the Anthrax scare, all Mail through the U.S. Postal Service was interrupted to the Washington, D.C. area. Therefore, on November 28, 2001 I could not send John Mapu's claim through Overnight Express Mail with the U.S. Postal Service.

However, the U.S. Postal Service has joined forced with FedEx for Overnight Express Mail Delivery.

On November 28, 2001, I personally went to a FedEx office in San Diego and sent two FedEx envelopes. 1) Notice of Appeal VA General Counsel; 2) U.S. Court of Appeals for Veterans Claims. They were both delivered on November 29, 2001 on time with the following status:

United States Court of Appeals for Veterans Claims
625 Indiana Avenue NW Suite #900
Washington, D.C. 20004
Tracking Number: 832603013070
Delivered on November 29, 2001 at 10:26am

Notice of Appeal VA General Counsel (027)
810 Vermont Avenue NW
Washington, D.C. 20420
Tracking Number: 832603013070
Delivered on November 29, 2001 at 9:47am

Regards,

Saline M. Lampe
Supervisor of Customer Service (A)
U.S. Postal Service
San Diego, CA

BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS
WASHINGTON, DC 20420

IN THE APPEAL OF **C 29 715 839**
JOHN MAPU, JR.

DOCKET NO. 98-17 540 A) DATE 31 JUL 01/SAF
)
)

On appeal from the
Department of Veterans Affairs (VA)
Regional Office (RO) in San Diego, California

THE ISSUES

1. Entitlement to service connection for cervical, thoracic, and lumbar spine disabilities.

2. Entitlement to an effective date earlier than April 16, 1998, for the award of an increased rating for a right shoulder disability.

REPRESENTATION

Veteran represented by: Disabled American Veterans

WITNESSES AT HEARING ON APPEAL

Veteran and a friend.

ATTORNEY FOR THE BOARD

K. Parakkal, Counsel

INTRODUCTION

The veteran served on active duty from November 1979 to December 1982.

This matter comes to the Board of Veterans' Appeals (Board) on appeal from a December 1997 RO decision which denied the veteran's claim of service connection for a cervical spine disability, a January 1999 RO decision which denied claims of service connection for thoracic and lumbar spine disabilities, and a May 1999 RO hearing officer's decision which granted the veteran an increased rating from 10 to 20 percent for a right shoulder disability, effective from April 16, 1998. The veteran appeals to the Board for service connection for cervical, thoracic, and lumbar spine disabilities and for an earlier effective date for an increased rating for a right shoulder disability.

In an August 1999 statement, the veteran indicated that he was no longer interested in appealing for a higher rating for a right shoulder disability; as such, this issue is no longer before the Board.

In March 2001, the veteran submitted new evidence in support of his claim, and he did not waive RO jurisdiction over such evidence. *See* 38 C.F.R. §§ 19.37, 20.1304(c). This evidence consists of a list of VA examinations (including dates and places) that the veteran apparently underwent, and does not contain any medical findings. This evidence does not address any of the key issues in this case, including the etiology of any current neck and back disabilities and it does not shed light on the matter of whether the veteran is entitled to an earlier effective date for a 20 percent rating for a right shoulder disability. Because this newly submitted evidence is not relevant to the claims on appeal, the Board may proceed with an adjudication of the veteran's claims.

In a March 2001 Form 9, and a June 2001 informal hearing presentation, the veteran's representative raised

the issue of service connection for a right knee disability; this claim has not been developed for appellate review and is referred to the RO for appropriate action.

FINDINGS OF FACT

1. Cervical, thoracic and lumbar spine problems were not diagnosed during service; and there is no competent medical evidence on file showing that any current cervical, thoracic, or lumbar disabilities are related to service or to a service-connected right shoulder disability.

2. By February 1992, November 1993, February 1996, and September 1996 RO decisions, the veteran was denied an increase in a 10 percent rating for a right shoulder disability; he was informed of the outcome of the decisions; and he did not perfect appeals for a higher rating.

3. On April 16, 1998, the RO received the veteran's claim for an increase in a 10 percent rating for a right shoulder disability; the RO subsequently increased the rating to 20 percent, effective April 16, 1998.

4. Within the year preceding the April 16, 1998, claim for an increased rating, it is not factually ascertainable that the right shoulder disorder increased from 10 percent to 20 percent.

CONCLUSIONS OF LAW

1. Cervical, thoracic, and lumbar spine disabilities were not incurred in or aggravated by service, and are not proximately due to or the result of a service-connected disability. 38 U.S.C.A. §§ 1131, 5107 (West 1991 & Supp. 2000); 38 C.F.R. §§ 3.303, 3.310 (2000).

2. The criteria for an effective date prior to April 16, 1998, for an increased rating for a service-connected right shoulder disability have not been met. 38 U.S.C.A. § 5110 (West 1991 & Supp. 2000); 38 C.F.R. § 3.400 (2000).

REASONS AND BASES FOR FINDINGS AND CONCLUSIONS

I. Factual Background

The veteran was examined for enlistment purposes in November 1979, at which time his spine was noted as clinically normal. In April 1980, the veteran presented for treatment after completing airborne exercises. He related that he had injured his right shoulder. On examination, he had edema with tenderness over the right acromioclavicular joint with painful and limited active range of motion. Cervical X-rays were normal. The assessment was an acromioclavicular separation of the right shoulder.

In the 1980s, following the veteran's service discharge, VA requested all of the veteran's service and Reserve medical records. In 1985, all available service medical records were forwarded to VA. Additionally, the U.S. Army Reserve responded to VA's records request by indicating that there was no available information regarding the veteran.

In August 1985, the veteran underwent a VA orthopedic compensation examination, during which he reported that he had injured his right arm and shoulder during airborne training. On examination, he had normal range of motion of the cervical and lumbar spine. The diagnosis was a history of subluxation of the right shoulder and lacerations of the right shoulder with atrophy of the right trapezius and weakness of abduction at the right shoulder.

By a November 1985 RO decision, service connection for a right shoulder disability was granted and a 10 percent rating under Diagnostic Code 5203 was assigned, effective from December 17, 1984. The rating board noted that the veteran was right-handed.

A July 1989 record shows that the veteran reported he began to have low back pain about the left side which

radiated to his abdomen, while shoveling at work. The diagnosis was an acute muscular strain, which was work related. It was also noted that he had undergone surgery one month earlier to remove lipomas from the back, and that this surgical area was the location of the strain. In mid-July 1989, private medical records show that the veteran's muscle strain of the low back had resolved.

In an August 1989 letter, Robert D. Power, M.D., indicated that the veteran had sustained a back injury on July 5, 1989, while shoveling at work. In a September 1989 letter, Dr. Power, indicated that the veteran had suffered a lumbosacral strain on the left side and had been treated with conservative measures. An examination revealed pain about the left lumbar region with radiation. A September 1989 private X-ray report of the lumbosacral spine reflects the impression of mild scoliosis.

In November 1991, the RO received a letter from the veteran indicating that he wanted an increased rating for his right shoulder disability. In November 1991, the RO informed the veteran that he needed to submit medical evidence in support of his claim, and he did not timely respond. In February 1992, the RO informed the veteran that it was administratively disallowing his claim since he had failed to furnish the requested information. In September 1992, the RO received another letter from the veteran indicating that he wanted an increased rating for his right shoulder disability. In November 1992, the RO informed the veteran that his claim was being denied due to his failure to report for a VA examination. In December 1992, the veteran indicated he wanted to "reopen" his claim for a shoulder condition. In other words, he indicated he wanted an increased rating for a right shoulder disability.

An April 1993 VA examination report shows that the veteran had tenderness over the lateral clavicle, and no pain and tenderness over the acromioclavicular joint area. A shoulder separation was not palpated or produced.

Complaints of pain were felt on pressure, and were localized to the trapezius ridge and acromioclavicular joint. Sensation was completely normal, and he had no axillary nerve disturbance. Range of motion was normal. Abduction was to 90 degrees; external rotation was to 90 degrees and not painful; internal rotation was to 80 degrees and not painful; backward extension was to 70 degrees; and forward flexion was to 150 degrees and not painful. Excellent musculature was indicated, and there was no atrophy. The diagnosis was a questionable dislocation; and it was noted that the veteran probably had an acromioclavicular joint injury. An April 1993 VA X-ray study of the right shoulder reflects a post-traumatic deformity with calcification and ossification in the coracoclavicular ligament along the inferior margin of the distal clavicle and a stable acromioclavicular separation which did not increase with weight bearing.

By a November 1993 RO decision, an increased rating for a right shoulder disability was denied. The veteran was informed of the adverse decision in a letter dated in December 1993, and he did not timely respond. On August 18, 1995, the RO received the veteran's application for an increased rating for a right shoulder disability.

An October 1995 VA joints compensation examination report reflects that the veteran reported having injured his right shoulder during active duty. On examination, it was noted that he "takes both shoulders from 0 to 90 degrees to 140 degrees and has some pain at that point. He goes from 0 to 90 to 150 degrees in forward flexion and then has some pain particularly on the right." His internal and external rotation was to 90 degrees, without difficulty. No findings were made with respect to the low back. The diagnoses included chronic intermittent low back pain. A diagnosis regarding the right shoulder was not made.

In a February 1996 decision, the RO denied the veteran's claim for an increased rating for a right shoulder disability. He was informed of the adverse decision that same month. In March 1996, he filed a timely notice of disagreement with respect to the RO's denial of his claim for an increased rating for a right shoulder disability. In April 1996, he was furnished with a statement of the case.

An April 1996 record from Balboa Chiropractic reflects that the veteran complained of neck, midback, and right shoulder pain. On examination, it was noted he had restricted abduction and extension in the right shoulder and slight tenderness under the acromioclavicular joint. The diagnoses included cervicalagia, multiple cervical subluxations, cervical segmental dysfunction, pain in the thoracic spine, thoracic segmental dysfunction, myalgia and myositis-thoracic, and sprains and strains of the right shoulder and right arm.

In September 1996, the RO again denied the veteran's claim for an increased rating for a right shoulder disability. He was informed of the outcome of this decision in October 1996. In October 1996, he was furnished with a supplemental statement of the case.

A February 1997 doctor's certificate shows that the veteran had been involved in a head-on automobile collision and had positive cervical, dorsal, and lumbosacral tests, diminished reflexes, and pain on palpation throughout the entire spine. The diagnosis was "cervico-brachial;" and it was noted that the diagnosis was confirmed on testing. It was noted that the veteran required treatment including chiropractic adjustments, physical therapy, and massage.

In a February 1997 letter, J. Sterling Ford, M.D., indicated that the veteran developed head, neck, and back pain, among other symptoms, following a motor vehicle accident in January 1997. It was noted that the veteran, while driving, was struck on the driver's side by another

car. On impact, his body was thrown forward and his head snapped backward. The impressions included a lumbar strain and neck pain with radiation into the upper extremities (rule out cervical radiculopathy). It was opined that the veteran's low back pain appeared to be the result of his musculoligamentous lumbar strain injuries which arose out of the motor vehicle accident.

In an April 1997 statement, David E. Libs, D.C., indicated that he had treated the veteran since he sustained injuries in an automobile accident. It was noted the veteran was receiving state disability benefits because of neck and back pain (with pins and needles down his left arm), and left hand swelling. It was noted he had abnormal electronystagmography tests. A May 1997 and July 1997 doctor's certificate, signed by Dr. Libs, reflects that the veteran was having constant neck, midback, and right shoulder pain. On June 13, 1997, the RO received the veteran's statement, which indicated he wanted to "re-open" his claim due to shoulder pain.

A July 1997 VA joints examination report shows that the veteran reported he had sustained a neck injury in 1980, as a result of a "power" jump. It was reported that this was a minor injury and was not X-rayed. He said he did not have any subsequent symptoms in service and did quite well after he was discharged. He said he had no neck trouble until his January 1997 automobile accident. On examination, it was generally noted that the veteran was very obese and it was difficult to evaluate him. His neck was noted as normal. With respect to the right shoulder, it was noted that an acromioclavicular separation was not detected. There was no instability but very slight tenderness of the acromioclavicular joint. He had full range of motion. Abduction was to 90 degrees, internal rotation was to 80 degrees, and external rotation was to 90 degrees. The veteran complained of pain with internal and external rotation in the right shoulder. His forward flexion was to 150 degrees and he complained of pain and backward extension was 70 degrees. His

complaints were very mild and he did not flinch or cringe as he went through his range of motion studies. His muscle power and sensation were normal. There was no instability. The diagnoses were a shoulder injury contusion. It was noted that he probably had a first degree acromioclavicular separation of the right shoulder. It was noted that there was no functional impairment, weakness, limitation of motion, painful motion, fatigability, or incoordination. The second diagnosis was a cervical spine injury, and it was opined that such came from an automobile accident in January 1997. It was noted that the veteran's current neck problems were not related to his 1980 injury. A handwritten notation below the diagnosis of a cervical spine injury again reflects that the veteran's present medical problems were not related to his 1980 injury.

A July 1997 VA neurological examination report shows that the veteran reported he had neck and back pain as a result of a fall from a parachute. He also reported that he had a subsequent automobile accident which aggravated his injuries. The neurological diagnoses included a cervical strain. As for etiology of the veteran's neck condition, it was noted that there was contradictory information on file in that a previous examination revealed that the veteran did not report any previous history of neck and head pain. It was further noted that there was no corroborative evidence (in the form of old records) showing that he was treated for neck pain. However, it was acknowledged that he was treated for shoulder pain. It was noted that if the veteran's story was to be believed, his current neck pain was attributable to his inservice parachute jump. However, the examiner indicated that he could not locate evidence which was supportive of the veteran's story, and it was opined that certainly the major predominance of the veteran's current symptoms were related to his most recent motor vehicle accident.

A July 1997 X-ray report regarding the shoulder shows that the veteran's acromioclavicular separation remained unchanged with or without weight bearing. An acromioclavicular separation was noted on the right at 7 millimeters. Dystrophic ossification or calcification was noted about the right coracoclavicular alignment along the interior margin of the right distal clavicle.

A July 1997 X-ray report regarding the cervical spine reflected slight straightening of the cervical spine. The examination was otherwise within normal limits. No degenerative disc disease and no encroachment upon the neural foramina was identified.

By a December 1997 RO decision, an increased rating for a right shoulder disability was denied. By a December 1997 letter, the RO was informed of the denial. The veteran was also furnished with a supplemental statement of the case.

VA outpatient treatment records, dated in 1998, show that the veteran wanted his VA examiners to indicate that treatment for his shoulder, namely injunctions, drained him.

On April 16, 1998, the OR received the veteran's statement which indicated that he wanted reconsideration of his right shoulder disability.

In an April 1998 letter, the veteran's massage therapist indicated that she had treated the veteran for shoulder and arm problems. She said the veteran had been unable to retain full time employment for long periods. She said his shoulder and arm conditions prevented him from pursuing normal activities, like paying with his son, among other things

An August 1998 VA consultation request reflects that the veteran quit his job secondary to chronic back and shoulder pain.

An August 1998 VA outpatient medical record reflects that the veteran reported having chronic low back pain

which was non-radiating. He said he could not recall injuring his back. A prior medical history of a back injury in 1986 was noted; however, the veteran could not recall what happened.

A November 1998 VA joints examination report shows that the veteran reported he was in the infantry during service. Subsequently, he said he worked as an auto detailer and as a forklift operator. Following an examination, the diagnoses were arthralgias of the right shoulder, which was deemed as possible bursitis or tendonitis of the shoulder joint. There was no functional impairment, limitation of motion, or painful motion. Expressions of pain were deemed inaccurate; and it was noted that he had more symptomatic complaints than physical findings. It was concluded that back and neck problems were not detected on examination; and it was concluded that his neck and back were normal. It was opined that there was no causal relationship between his shoulder problems and his neck and back problems.

A November 1998 X-ray study reflected bone fragments adjacent to the coracoid process on the right, as described above. He had an otherwise normal right shoulder and scapula.

A VA outpatient treatment record, dated in November 1998, shows that the veteran requested that the examiner "record" that the prescription given to him for treatment of his shoulder, neck and back pain "drained" him, thereby interfering with his ability to do his work and causing him to lose his job.

A November 1998 X-ray of the cervical spine was normal. X-ray studies to the lumbar vertebra revealed surgical clips in the right upper quadrant. The impressions were status post right upper quadrant surgery and were otherwise normal.

At a March 1999 RO hearing, the veteran testified that he injured his neck and back when he jumped off of a

tower, which was approximately 30 to 50 feet high, during airborne school. At the time of the injury, he said, he had not received treatment for his back but was treated for shoulder and neck problems. He said he had intermittent back and neck problems after service. In particular, he said, his back started hurting in the 1980s, around the time he filed a VA claim for his neck disability. As for his current condition, he related he was taking medication and was unable to work. He said he had right shoulder pain, among other symptoms.

II. Legal Analysis

There has been a significant change in the law during the pendency of this appeal with the enactment of the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000). This law eliminates the concept of a well-grounded claim, redefines the obligations of VA with respect to the duty to assist, and supersedes the decision of the United States Court of Appeals for Veterans Claims in *Morton v. West*, 12 Vet. App. 477 (1999), *withdrawn sub nom. Morton v. Gober*, 14 Vet. App. 174 (2000) (per curium order) (holding that VA cannot assist in the development of a claim that is not well grounded). The new law also includes an enhanced duty to notify a claimant as to the information and evidence necessary to substantiate a claim for VA benefits. The VCAA is applicable to all claims filed on or after the date of enactment, November 9, 2000, or filed before the date of enactment and not yet final as of that date. Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, § 7, subpart (a), 114 Stat. 2096, 2099 (2000) *See also Karnas v. Derwinski*, 1 Vet. App. 308 (1991). In this case, even though the RO did not have the benefit of the explicit provisions of the VCAA, VA's duties have been fulfilled.

First, VA has a duty to notify the veteran and his representative of any information and evidence needed to substantiate and complete a claim. Veterans Claims

Assistance Act of 2000, Pub. L. No. 106-475, § 3(a), 114 Stat. 2096, 2096-97 (2000) (to be codified as amended at 38 U.S.C. §§ 5102 and 5103). The record shows that the veteran was notified of the RO decisions, which denied the claims of service connection for cervical, thoracic and lumbar spine disabilities, and the RO decision which declined to assign an earlier effective date for a 20 percent rating for a right shoulder disability. The service connection claims were denied due to a lack of medical evidence linking the veteran's current spine disabilities to service, and with regard to the earlier effective date claim, such was denied as there was a lack of evidence showing an increase in his right shoulder disability prior to April 16, 1998. Those are the key issues in this case, and the RO's decisions, as well as the statement of the case and subsequent supplemental statements of the case, informed the veteran what was needed to substantiate his claims. VA has met its duty to inform the veteran. The Board concludes the discussions in the rating decision, statement of the case, supplemental statement of the case, and letters sent to the veteran informed him of the information and evidence needed to substantiate his claims and complied with VA's notification requirements.

Second, VA has a duty to assist the veteran in obtaining evidence necessary to substantiate the claim. Veterans Claims Assistance Act at 2000, Pub. L. No. 106-475, § 3(a), 114 Stat. 2096, 2097-98 (2000) (to be codified at 38 U.S.C. § 5103A). In April 1999, the case was remanded by the Board for the purpose of conducting further evidentiary development. The Board specifically informed the veteran, in its remand, that he should submit relevant evidence in support of his claims. The RO has properly requested all relevant (treatment) records identified by the veteran and the veteran was informed in various letters what records the RO was requesting and he was asked to assist in obtaining the evidence. The veteran has not referenced any unobtained evidence that might aid his claims or that might be

pertinent to the bases of the denial of his claims. While VA has a duty to assist the veteran in the development of his claims, that duty is not "a one-way street." If a claimant wishes help, he cannot passively wait for it. *See Wood v. Derwinski*, 1 Vet. App. 190, 193 (1991), *motion for reconsideration denied*, 1 Vet. App. 406 (1991). In sum, the Board finds that VA has done everything reasonably possible to assist the veteran.

In the circumstances of this case, a remand would serve no useful purpose. *See Soyini v. Derwinski*, 1 Vet. App. 540, 546 (1991) (strict adherence to requirements in the law does not dictate an unquestioning, blind adherence in the face of overwhelming evidence in support of the result in a particular case; such adherence would result in unnecessarily imposing additional burdens on VA with no benefit flowing to the veteran); *Sabonis v. Brown*, 6 Vet. App. 426, 430 (1994) (remands which would only result in unnecessarily imposing additional burdens on VA with no benefit flowing to the veteran are to be avoided). VA has satisfied its duties to notify and to assist the veteran in this case. Further development and further expending of VA's resources is not warranted.

Finally, even though the RO did not have the benefit of the explicit provisions of the VCAA, VA's duties have been fulfilled. Moreover, as the Board finds that the directives of VCAA have been complied with regarding VA's duties to notify and to assist the appellant, the Board finds that the veteran has not been prejudiced by the Board's consideration of the merits of his claims, as set forth below. *See Bernard v. Brown*, 4 Vet. App. 384 (1993) [when the Board addresses in its decision a question that has not been addressed by the RO, it must consider whether the veteran has been given adequate notice to respond and, if not, whether he has been prejudiced thereby]. For the reasons previously set forth, the Board believes that the veteran has been given ample opportunity to provide evidence and argument in support

of his claim. In short, the Board finds that the veteran has been given adequate notice of the need to submit evidence or argument and that he is not prejudiced by this decision. As such, the Board will proceed with a discussion of the merits of the veteran's claims. Although the RO initially denied the claims for service connection as not well grounded, the record included medical opinions regarding the likely etiology for the claimed disability of the spine. Further, the RO hearing officer decision shows the claim was decided on the merits. The veteran did not provide any favorable medical opinion although he had mentioned such at the hearing. The hearing officer noted this in the decision provided to the veteran. Neither the veteran nor his representative indicated in response that the claimed evidence would be forthcoming.

Service Connection Claims

Service connection may be granted for a disability resulting from a disease or injury which was incurred in or aggravated by active military service. 38 U.S.C.A. §§ 1101, 1131; 38 C.F.R. § 3.303. Secondary service connection will be granted when a disability is proximately due to or the result of a service connected disease or injury. 38 C.F.R. § 3.310. Secondary service connection may be established for a disability which is aggravated by a service-connected disability. *Allen v. Brown*, 7 Vet. App. 439 (1995). Finally, pertinent regulations provide that service connection may be granted for any disease diagnosed after discharge when all the evidence, including that pertinent to service, establishes that the disease was incurred in service. 38 C.F.R. § 3.303(d).

A review of the veteran's service medical records reveals no complaints, treatment, or diagnoses of spine disabilities, affecting the cervical, thoracic, or lumbar regions. While the veteran alleges that he injured his neck and back while performing airborne training

exercises, the service medical records reveal that he only complained of and was only treated for right shoulder problems. In fact, at the time of the training accident, his neck X-rays were described as normal.

Post-service medical evidence shows that the veteran underwent a VA orthopedic examination in August 1985, a few years after his service discharge, and it was noted he had normal range of motion of the cervical and lumbar spine. A few years later, in July 1989, the veteran presented for low back treatment. He reported that he had been shoveling at work, and began to have low back pain. The diagnosis was an acute muscular strain. Later records show that the muscle strain of the law back resolved. Additionally, a September 1989 X-ray study of the lumbosacral spine revealed mild scoliosis.

Medical evidence, from the early 1990s, is silent for any complaints, treatment or a diagnosis of spinal disabilities. In 1996, records show that the veteran received private chiropractic treatment and was diagnosed as having cervicalgia, multiple cervical subluxations, cervical segmental dysfunction, thoracic spine pain, and thoracic segmental dysfunction.

In January 1997, the veteran was involved in an automobile accident. Medical records show that he was diagnosed as having neck and lumbar pain with radiation. In July 1997, the veteran underwent a VA joints compensation examination, following which it was opined that his neck was completely normal. The impressions included a cervical spine injury and such was deemed to have stemmed from a January 1997 automobile accident. It was specifically opined that while the veteran had sustained injury in 1980 (during service), such apparently resolved because he had no neck problems until January 1997. A July 1997 VA neurological examination revealed that there was no evidence (e.g. old service medical records) on file which corroborated the veteran's story of having injured his

neck and back in a parachute jump during service in 1980. A November 1998 VA joints examination report reflects the conclusion that the veteran had no back and neck problems on examination; and it was opined that there was causal relationship between his service-connected right shoulder disability and any claimed neck and back problems.

The Court has stated that "Congress specifically limits entitlement for service-connected disease or injury to cases where such incidents have resulted in a disability," and held that "[i]n the absence of proof of a present disability[,] there can be no valid claim." *Brammer v. Derwinski*, 3 Vet. App. 223, 225 (1992) (emphasis added); *Rabideau v. Derwinski*, 2 Vet. App. 141, 143-44 (1992). In the instant case, there is little evidence of current and competent diagnoses of spinal disabilities. As noted above, VA compensation examinations conducted in 1997 and 1998 reveal that the veteran's neck and back are clinically normal. However, even assuming that he does indeed have current cervical, thoracic, and lumbar spine disabilities, there is still no competent evidence linking such to service or to his service-connected right shoulder disability. Rather, the evidence tends to show that he experienced several post-service incidents which resulted in neck and back problems. Specifically, in July 1989 he hurt his back while shoveling at work; and in January 1997, he sustained back and neck trauma in an automobile accident. Medical opinions described above, including VA opinions rendered in 1997 and 1998, are to the effect that: the claims file did not provide any corroborative evidence showing inservice spinal injuries; any spinal disabilities arose from a 1997 motor vehicle accident; and/or any spinal disabilities are not related to his service-connected right shoulder disability.

In sum, it is noted that cervical, thoracic, and lumbar spin disabilities were never noted during the veteran's period of active service. Further, while there is some, albeit weak, evidence of current spinal disabilities, there

is no competent medical evidence linking such to his period of service or to his already service-connected right shoulder disability. 38 C.F.R. § 3.310. Absent competent medical evidence of service incurrence and causality, the Board finds that the veteran's claims of service connection for cervical, thoracic, and lumbar spine disabilities must be denied. *Caluza v. Brown*, 7 Vet. App. 498, 507 (1995).

The veteran's statements and testimony in support of his claims are acknowledged. His allegations are to the effect that he has current cervical, thoracic, and lumbar spine disabilities which are attributable to service; however, such allegations are not cognizable evidence since, as a layman, he has no competence to give a medical opinion on the diagnosis or etiology of a disorder. *Espiritu v. Derwinski*, 2 Vet. App. 492 (1992).

Earlier Effective Date Claim

The law provides that increased ratings are effective as of the date of VA receipt of claim, or date entitlement arose (i.e., what it is factually shown that the requirements for the increased rating are met), whichever is later; an exception to this rule is that the effective date may be the earliest date as of which it is factually ascertainable that an increase in disability had occurred, provided a claim is received by the VA within one year after that date. 38 U.S.C.A. § 5110(a), (b)(2); 38 C.F.R. § 3.400(o).

By RO decisions rendered in February 1992, November 1993, February 1996, and September 1996, the veteran was denied an increase in a 10 percent rating for a right shoulder disability. The veteran was duly informed of the decisions and he did not appeal for a higher rating; thus, the decisions became final. 38 U.S.C.A. § 7105.

Thus, the effective date for a subsequent increase in the 10 percent rating must be determined in relation to a new claim. Here, the RO received the veteran's claim for

an increased rating on April 16, 1998. The veteran may prevail if evidence on file shows that there was an increase in the severity of the right shoulder disability, to the 20 percent level, within the year preceding the April 16, 1998 claim.

In this regard, it is noted that medical evidence of record shows that the veteran was examined for VA compensation purposes in July 1997, within the one year period prior to the receipt of his April 1998 claim. This July 1997 VA examination report shows no separation or instability of the acromioclavicular joint; however, there was very slight tenderness. He had full range of motion, but had mild complaints of pain on testing. (It was noted that he neither flinched nor cringed as he performed range of motion studies.) There was no objective evidence of functional impairment, weakness, limitation of motion, painful motion, fatigability, or incoordination. Muscle power and sensation were normal. The final diagnosis was a right shoulder contusion.

Limitation of motion of the arm is evaluated under 38 C.F.R. § 4.71(a), Diagnostic Code 5201, which provides for a 20 percent rating (the lowest available rating) where motion of the major or minor arm is limited to the shoulder level. A 30 percent rating is warranted where motion of the major arm is limited midway between the side and shoulder level. 38 C.F.R. § 4.71a, Diagnostic Code 5201. Normal range of motion for the shoulder is as follows: forward elevation (flexion) to 180 degrees; abduction to 180 degrees; internal rotation to 90 degrees; and external rotation to 90 degrees. 38 C.F.R. § 4.71, Plate I.

Diagnostic Code 5202 pertains to other impairment of the humerus. A 20 percent evaluation (the lowest available rating under Diagnostic Code 5202) is warranted for malunion of the humerus of the major or minor upper extremity with moderate deformity. A 20 percent evaluation is also warranted where there are

infrequent episodes of dislocation of the scapulohumeral joint of the major or minor upper extremity with guarding of movement only at the shoulder level. 38 C.F.R. § 4.71a, Diagnostic Code 5202.

Diagnostic Code 5203 pertains to impairment of the clavicle and scapula. A 20 percent rating is warranted where there is dislocation of the clavicle or scapula, or nonunion of the clavicle or scapula with loose movement. These ratings apply to either the major or minor upper extremity. 38 C.F.R. § 4.71a, Diagnostic Code 5203.

In sum, the Board notes that the findings from the July 1997 VA compensation examination report are not productive of a 20 percent rating for a right shoulder disability under the provisions of 38 C.F.R. §§ 4.40, 4.45, 4.71a, Diagnostic Codes 5201, 5202, and 5203. The examination report does not reflect that the veteran's right arm, the major extremity, was limited in motion to the shoulder level, which would be productive of a 20 percent rating under 38 C.F.R. § 4.71a, Diagnostic Code 5201. 38 C.F.R. § 4.31. Rather, his motion of the right shoulder was described as full. Even with due consideration of his complaints of pain on range of motion testing, no more than a 10 percent rating would be warranted applying the rating scheme under Diagnostic Code 5203. There are no clinical or radiological findings which reflect a malunion of the humerus, a dislocation or nonunion of the clavicle or scapula, or infrequent episodes of dislocation of the scapulohumeral join with guarding of movement only at the shoulder level, which would be productive of a 20 percent rating under 38 C.F.R. § 4.71a, Diagnostic Codes 5202 or 5203.

Again, while the July 1997 VA examination report does reflect that the veteran complained of right shoulder pain, these subjective complaints were described as "mild." It was specifically noted that he neither flinched nor cringed while doing range of motion studies. Objective testing did not reveal any functional

impairment, weakness, limitation of motion, fatigability, or incoordination. As such, the Board finds the veteran's symptomatology during the July 1997 VA examination was not productive of a 20 percent rating under the provisions of 38 C.F.R. §§ 4.10, 4.40, and 4.45. The Board observes that the RO hearing officer rated the disability by analogy to Diagnostic Code 5201 and thus provided a higher rating. There is no significance to inconsistent disability coding on the rating sheet (Diagnostic Code 5260, limitation of flexion of the leg), which is obviously a typographical error. The hearing officer decision clearly explained the basis for the rating and the diagnostic codes selected.

In summary, the Board concludes that the July 1997 VA examination report does not reflect any findings which show that the veteran's right shoulder was 20 percent disabling; thus, his claim for an earlier effective date may not prevail based on this evidence. Further, there are no other comprehensive medical records within the year preceding the April 16, 1998, claim, upon which it could be factually ascertained that the right shoulder disability increased form the 10 percent to 20 percent level, and thus there is no legal basis for an increase in the 20 percent rating from a date prior to the date assigned by the RO, April 16, 1998. *Hazan v. Gober*, 10 Vet. App, 511 (1997).

In fact, the veteran does not actually contend that the right shoulder disability increased in severity within the year before his April 16, 1998, claim for an increased rating. Rather, he asserts the condition increased in severity many years earlier, an that medical evidence on file from the 1980s and 1990s confirms that his condition was 20 percent disabling. It appears that he is contending that such evidence constitutes informal claims for an increased rating for a right shoulder disability. Pertinent regulations provide that the date of an outpatient or hospital examination or admission to a VA or uniformed service hospital will be accepted as the date

of receipt of an informal claim for increased benefits, or an informal claim to reopen, with respect to disabilities for which service connection has been granted. 38 C.F.R. § 3.157. However, among other requirements are that the informal claim must identify the benefit sought, and a timely formal claim must follow the informal claim. 38 C.F.R. § 3.155; *Williams v. Gober*, 10 Vet. App. 447 (1997). In the instant case, there is no medical evidence, correspondence from the veteran, or any other document, which is subsequent to the final September 1996 RO decision (which denied an increased rating for the right shoulder disability) and prior to the April 16, 1998, effective date set by the RO, showing that the veteran desired an increased rating for the right shoulder disability. As such, the Board must conclude that the veteran's argument regarding an earlier effective date (via earlier informal claims) is without merit.

The law, not the evidence, is dispositive of the outcome of the present claim for an effective date earlier than April 16, 1998, for an increased 20 percent rating for the right shoulder disability. As a matter of law, the claim must be denied. *Sabonis v. Brown*, 6 Vet. App. 426 (1994).

ORDER

Service connection for a cervical spine disability is denied.

Service connection for a thoracic spine disability is denied.

Service connection for a lumbar spine disability is denied.

Entitlement to an effective date earlier than April 16, 1998, for an increased rating, to 20 percent, for a right shoulder disability is denied.

Mark J. Swiatek
Acting Member, Board of Veterans' Appeals

Department of Veterans Affairs

APPEALS NOTICE: A copy of the Board of Veterans' Appeals (BVA) decision in your appeal accompanies this notice. This is the final decision for all issues either allowed, denied, or dismissed by the BVA in the "Order: section of the decision. A "remand" section may follow the "Order," but a remand is not a final decision. *The advice below only applies to issues that were allowed, denied, or dismissed in the "Order."*

***

(3) Appeal to the United States Court of Appeals for Veterans Claims: You have the right to appeal this decision to the United States Court of Appeals for Veterans Claims (known as the United States Court of Veterans Appeals prior to March 1, 1999) (hereinafter, "the Court") if this BVA decision follows a Notice of Disagreement filed on or after November 18, 1988. A Notice of Appeal must be filed with the Court within 120 days from the date of mailing of the notice of the BVA's decision. The date of mailing is the date that appears on the face of the enclosed BVA decision. The Court's address is: The United States Court of Appeals for Veterans Claims, 625 Indiana Avenue, NW, Suite 900, Washington, DC 20004. You may obtain information about the form of the Notice of Appeal, the procedure by which you may file your Notice of Appeal with the Court, the filing fee, and other matters covered by the Court's rules directly from the Court. You must also mail a copy of the Notice of Appeal to the VA General Counsel (02), 810 Vermont Avenue, NW, Washington, DC 20420. However, this does not take the place of the Notice of Appeal you must file with the Court. *Filing a copy of your Notice of Appeal with the General Counsel, the Board, or any other VA office WILL NOT protect your right of appeal to the Court.*

***

FEB 15 2006
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No. 05-605

In the Supreme Court of the United States

JOHN MAPU, JR., PETITIONER

v.

JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly declined to apply equitable tolling, in the particular circumstances presented, to excuse petitioner's untimely filing of a notice of appeal under 38 U.S.C. 7266.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 397 F.3d 1375. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 13a-20a) dismissing petitioner's appeal is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2005. A petition for rehearing was denied on June 16, 2005 (Pet. App. 11a-12a). On September 7, 2005, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including November 13, 2005 (a Sunday), and the petition was filed on November 14, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner failed to timely file his notice of appeal with the Court of Appeals for Veterans Claims (Veterans Court) seeking review of a decision of the Board of Veterans Appeals (Board) affirming a decision of the Department of Veterans Affairs (DVA) denying benefits for an alleged service-connected disability. Pet. App. 1a-2a. Under 38 U.S.C. 7266(a) (Supp. II 2002), a notice of appeal must be filed with the Veterans Court within 120 days after the date upon which the Board mailed its decision. There is no dispute that, pursuant to Section 7266(a), petitioner was required to file his notice of appeal with the Veterans Court by November 28, 2001, and that petitioner failed to file his notice of appeal with the Veterans Court by that date. Pet. 5; Pet. App. 1a-2a, 28a.

Instead, on November 28, 2001, the 120th day of the appeal period, petitioner went to a United States post office intending to send his notice of appeal to the Veterans Court via overnight United States mail. Pet. App. 1a-2a. Petitioner was informed by a Postal Service employee that, due to the anthrax crisis, overnight United States mail deliveries to Washington, D.C., had been suspended. *Id.* at 2a. The Postal Service employee told petitioner that, if he wanted his package delivered overnight, he should utilize a private carrier service. *Ibid.* Petitioner sent his notice of appeal by Federal Express overnight delivery service, and the Veterans Court received the package the following day—121 days after the Board's decision was mailed. *Ibid.*

2. In a single-judge order, the Veterans Court dismissed petitioner's appeal for lack of jurisdiction because the court had not received the notice of appeal

within 120 days of the mailing of the Board's decision, as required by 38 U.S.C. 7266(a) (Supp. II 2002). Pet. App. 28a-30a. The Veterans Court held that petitioner was not entitled to benefit from Section 7266(c) (formerly Section 7266(a)(3)), known as the "postmark rule," which provides that a notice of appeal shall be deemed received by the Veterans Court "[o]n the date of the United States Postal Service postmark stamped on the cover in which the notice is posted, if the notice is properly addressed to the Court and is mailed." 38 U.S.C. 7266(c)(2) (2000 & Supp. II 2002); Pet. App. 30a. The Veterans Court also rejected petitioner's request for equitable tolling of the appeal period. *Ibid.*

3. A three-judge panel of the Veterans Court affirmed the single-judge order, again finding that petitioner's appeal was untimely and that he was ineligible for equitable tolling of the appeal period. Pet. App. 25a-27a. Petitioner appealed to the Federal Circuit, which issued an order remanding the matter to the Veterans Court for consideration of the Federal Circuit's then-recent decisions in *Jaquay* v. *Principi*, 304 F.3d 1276 (Fed. Cir. 2002) (en banc), and *Santana-Venegas* v. *Principi*, 314 F.3d 1293 (Fed. Cir. 2002), both of which concern the availability of equitable tolling under Section 7266. Pet. App. 23a. On remand, the Veterans Court found that both decisions were inapplicable to the facts of petitioner's appeal, and again held that his appeal was untimely. *Id.* at 13a-20a.

4. The Federal Circuit affirmed the Veterans Court's dismissal of petitioner's appeal.[1] Pet. App. 1a-

[1] As a preliminary matter, the court of appeals rejected petitioner's argument that the phrase "delivering or mailing," set forth in Section 7266(b), encompasses the act of sending a notice of appeal for delivery via Federal Express. Pet. App. 3a-4a; 38 U.S.C. 7266(b) (2000 & Supp.

10a. The court of appeals acknowledged that, under its case law, the doctrine of equitable tolling is applicable to the 120-day period for filing a notice of appeal under Section 7266. The court noted that it had declined to limit the doctrine of equitable tolling to a "small and closed set of factual patterns," and had "rejected the approach of looking to whether a particular case falls within the facts specifically identified in *Irwin* [v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)] or one of our prior cases." Pet. App. 6a-7a.[2] Rather, the court recognized that, in previous decisions, it had held that "equitable tolling of the deadline in 38 U.S.C. § 7266 is allowed 'in a variety of circumstances,'" *id.* at 5a (quoting *Barrett* v. *Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004)), and cited numerous Federal Circuit decisions that had applied equitable tolling to Section 7266's deadline for filing a notice of appeal. *Id.* at 6a.

To determine whether equitable tolling was appropriate in the circumstances of this case, the court of appeals looked to *Irwin*, which asked, *inter alia*, "whether Congress has either provided or intended that equitable tolling be unavailable in the situation at issue." Pet. App. 7a. After examining the language, structure, and legislative history of Section 7266, the court of appeals concluded that, in amending Section 7266 to provide that a notice of appeal is considered timely filed if it was re-

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II 2002). The petition does not contest that aspect of the court of appeals' decision. Pet. 8-9.

[2] *Irwin* described two situations in which equitable tolling has been recognized in private suits: "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." 498 U.S. at 95-96.

ceived and postmarked by the Postal Service within the appeal period, Congress clearly "wanted the postmark rule to apply only to a notice of appeal that was mailed using the Postal Service." *Id.* at 8a.

The court reasoned that "[t]he intention to limit the waiver of sovereign immunity to the strict confines of the postmark rule is further manifested in the provisions of Sections 7266(c) and (d), which clearly state that a Postal Service postmark is necessary for the postmark rule to apply." Pet. App. 8a-9a. The court cited legislative history for a related bill, set forth in a Joint Explanatory Statement, which stated "that the postmark rule would not be broadly applicable, but that only 'legible United States Postal Service postmarks would be sufficient.'" *Id.* at 8a (quoting 140 Cong. Rec. 28,849 (1994)).

The court of appeals also relied on language in the Joint Explanatory Statement which recognized that "if a [notice of appeal] is delivered to the Court (for example, by private courier or delivery service), it would be considered timely filed if it was received by the Court within the 120-day limit established by Congress." Pet. App. 8a (brackets in original) (quoting 140 Cong. Rec. 28,849 (1994)). Accordingly, the court concluded that Congress, which was aware that the Veterans Court requires actual receipt of the notice of appeal, "specifically limited the exception created by the postmark rule to notices of appeal sent through the Postal Service. Thus, notices of appeal delivered by other means were specifically excluded from the application of the new rule." *Id.* at 9a.

The court of appeals therefore rejected petitioner's attempt to apply equitable tolling in a manner that would extend the postmark rule to packages sent by private carrier service. Pet. App. 9a. The court rea-

soned that "Congress's *explicit* decision not to broaden the postmark rule by extending it to delivery services other than the Postal Service must trump an extension of equitable tolling to this case." *Ibid.* (emphasis added). Accordingly, the court concluded that "equitable tolling is unavailable in a case such as this one, in which the veteran's only excuse for a late filing of the notice of appeal is that a delivery service other than the Postal Service was used." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. As a threshold matter, petitioner's arguments lack merit because the 120-day period for filing a notice of appeal pursuant to 38 U.S.C. 7266 is not subject to equitable tolling. Contrary to the position adopted by the court of appeals in *Bailey* v. *West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc), which authorized equitable tolling of the Section 7266 filing period in reliance on *Irwin*, the equitable tolling doctrine applies to statutes of limitations, like that at issue in *Irwin*, but has no application to timing-of-review provisions like Section 7266. See generally *Bailey*, 160 F.3d at 1371-1373 (Bryson, J., dissenting). As this Court has made clear, "[s]tatutory provisions specifying the timing of review [are] * * * 'mandatory and jurisdictional' * * * and are not subject to equitable tolling." *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (quoting *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990)). Under a correct understanding of the governing legal principles, therefore, the question set forth in the petition is not presented in this case, be-

cause equitable tolling would be unavailable in any event.[3]

2. Contrary to petitioner's assertions (Pet. 8-15), the court of appeals did not foreclose the application of equitable tolling to Section 7266 as a matter of law, but instead held only that petitioner's particular excuse for late filing was not one that merited equitable relief. Petitioner simply ignores the court of appeals' analysis, which emphasized that equitable tolling *is applicable* to Section 7266's 120-day deadline "in a variety of circumstances." Pet. App. 5a. Far from erecting an "unforgiving citadel of technicality," as petitioner suggests (Pet. 16), the court of appeals took a broad view of the availability of equitable tolling under Section 7266 by refusing to limit equitable tolling to a "small and closed set of factual patterns." Pet. App. 7a. The court noted that "[s]uch a conclusion would run counter to our holding that 'requiring ruthless application of the time limit [of Section 7266] is somewhat arbitrary.'" *Ibid.* (first brackets in original) (quoting *Bailey*, 160 F.3d at 1364).

Additionally, the court of appeals cited approvingly to several cases in which the Federal Circuit applied equitable tolling to excuse the untimely filing of a notice of appeal under Section 7266. Pet. App. 5a-6a (citing *Brandenburg* v. *Principi*, 371 F.3d 1362, 1364 (Fed. Cir. 2004); *Barrett*, 363 F.3d at 1318; *Santana-Venegas*, 314 F.3d at 1298; *Jaquay*, 304 F.3d at 1288; and *Bailey*, 160 F.3d at 1385). Thus, the court of appeals' decision did not render equitable tolling inapplicable to Section 7266—to the contrary, the court recognized that the

[3] The government did not raise this argument in the court of appeals because it was foreclosed by Federal Circuit precedent. Particularly in light of the jurisdictional nature of the objection, it has not been waived.

Federal Circuit has repeatedly permitted equitable tolling of the 120-day deadline in a broad array of factual situations.

3. Petitioner cites several decisions of this Court for the proposition that "limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." Pet. 2 (quoting *Young* v. *United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted)); see Pet. 9-12 (citing *Young*, 535 U.S. at 49; *United States* v. *Beggerly*, 524 U.S. 38 (1998), *United States* v. *Brockamp*, 519 U.S. 347 (1997)). Petitioner also references several court of appeals decisions for the general proposition "that Congress does *not* implicitly preclude equitable tolling by simply providing one or more specific exceptions to a particular statutory deadline." Pet. 2 (citing *Neverson* v. *Farquharson*, 366 F.3d 32, 40-41 (1st Cir. 2004); *Chung* v. *Department of Justice*, 333 F.3d 273, 277 (D.C. Cir. 2003); *Perez* v. *United States*, 167 F.3d 913, 917 (5th Cir. 1999)).

The court of appeals' decision in this case, however, is not inconsistent with *Young*, *Beggerly*, or *Brockamp*, or with the various court of appeals decisions relied on by petitioner. In the first place, those decisions involved statutes of limitations, not jurisdictional timing-of-review provisions like Section 7266, and thus provide no support for a broad rule of equitable tolling in the circumstances of this case. Even leaving that basic distinction aside, moreover, the approach taken by the court of appeals here is consistent with those decisions. The court first concluded that equitable tolling of Section 7266 *is available* as a general matter, and then asked whether "Congress has either provided or intended that equitable tolling be unavailable in the situation at issue."

Pet. App. 7a. (citing *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)); see *Bowen* v. *City of New York*, 476 U.S. 467, 480 (1986) (determining first "whether equitable tolling is consistent with Congress' intent in enacting [the statute]," and then deciding "whether tolling is appropriate on these facts"). That is precisely the approach mandated by this Court's equitable tolling cases and followed by the decisions from other circuits cited by petitioner.

In deciding whether equitable tolling applies to the particular circumstances presented here, the court of appeals did not proceed by negative implication alone. Rather, the court looked to the text, structure, and legislative history of the statute to determine that equitable tolling was not available in the specific context of untimeliness due to the use of a private mail carrier. Pet. App. 3a-4a. Petitioner's argument that deposit with an overnight carrier is sufficient to invoke equitable tolling is contrary to the plain language of the statute and, indeed, would create another exception not contemplated by Congress. Cf. *Beggerly*, 524 U.S. at 48-49 (given "the unusually generous nature of the [Quiet Title Act's] limitations time period, extension of the statutory period by additional equitable tolling would be unwarranted").

The legislative history of Section 7266 demonstrates that Congress specifically considered whether the benefit of the postmark rule should apply to private common carriers like Federal Express, and determined that it should not. Pet. App. 7a-9a. Indeed, regarding the proposed amendment to Section 7266, Congress recognized that "if a [notice of appeal] is delivered to the Court (for example, by private courier or delivery service), it would be considered timely filed if it was received by the Court

within the 120-day limit established by Congress." *Id.* at 8a (quoting 140 Cong. Rec. at 28,849).

Congress' clear intent to apply the postmark rule only to filings made by United States mail would thus be thwarted if equitable tolling could be used to excuse the untimeliness of a notice of appeal made tardy solely because the appellant used a private courier or delivery service rather than the United States mail. The court of appeals was therefore correct to conclude that "Congress's explicit decision not to broaden the postmark rule by extending it to delivery services other than the Postal Service must trump any extension of equitable tolling to this case." Pet. App. 9a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 05-605

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

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The Government begins its opposition brief with a curious "threshold" argument. Opp. 6. According to the Government, "under a correct understanding of the governing legal principles, ... the question set forth in the petition is not presented in this case." *Id.* That is so, the Government asserts, because the statute at issue here, 38 U.S.C. § 7266, is a "timing-of-review provision[]," not a limitations provision, and hence supposedly not subject to equitable tolling. *Id.*; *see also id.* at 8. The Government concedes, as it must, that the Federal Circuit squarely rejected this argument in *Bailey v. West*, 160 F.3d 1360, 1366-67 (Fed. Cir. 1998) (*en banc*), *see* Opp. 6; indeed, the Government contends that it would have been futile even to raise this argument below, *see id.* at 7 n.3.

This "threshold" argument is not an argument *against* review by this Court; it is an argument *for* review by this Court. If the Government is right, then the Federal Circuit's error is more profound, not less so. Because only the Federal Circuit can hear appeals from the Court of Appeals for Veterans Claims, *see* 38 U.S.C. § 7292, only the Federal Circuit can address whether, and under what circumstances, equitable tolling applies to 38 U.S.C. § 7266. As noted above, the *en banc* Federal Circuit in *Bailey* rejected the Government's sweeping position that equitable tolling *never* applies to § 7266 (thereby overruling previous panel decisions, *see, e.g.*, *Cummings v. West*, 136 F.3d 1468, 1472 n.2 (Fed. Cir. 1998); *Mayer v. Brown*, 37 F.3d 618, 619 (Fed. Cir. 1994); *Butler v. Derwinski*, 960 F.2d 139, 140-41 (Fed. Cir. 1992)). If, as the Government contends, the *en banc* decision in *Bailey* is wrong, then the Federal Circuit is wasting its time by deciding equitable tolling cases arising under § 7266 (including, but not limited to, this one). *See, e.g.*, *Arbas v. Nicholson*, 403 F.3d 1379, 1381 (Fed. Cir. 2005); *Brandenburg v. Principi*, 371 F.3d 1362, 1363-64 (Fed. Cir. 2004); *Barrett v. Principi*, 363 F.3d 1316, 1318 (Fed. Cir. 2004); *Bailey v. Principi*, 351 F.3d 1381, 1383-84 (Fed. Cir. 2003); *Santana-Venegas v. Principi*, 314 F.3d

1293, 1297-98 (Fed. Cir. 2002); *Jaquay v. Principi*, 304 F.3d 1276, 1283 (Fed. Cir. 2002) (*en banc*). Although a litigant "is entitled to defend the judgment on any ground that it properly raised below," *Jones v. United States*, 527 U.S. 373, 396 (1999), it is hardly persuasive for the Government to argue against review in *this* case by arguing that the Federal Circuit erred in *another* case (especially an *en banc* case like *Bailey*). If anything, the Government's challenge to *Bailey* only underscores that review is appropriate here because *neither* side thinks that the Federal Circuit correctly analyzed this case.

Turning to the question presented in the petition, the Government's position boils down to the proposition that the application of equitable tolling here would be "contrary to the plain language of the statute." Opp. 9. Tellingly, however, the Government identifies no such "plain language." Rather, the Government simply insists that petitioner's appeal was untimely under the statute, because a notice of appeal sent by Federal Express (unlike a notice of appeal sent by U.S. mail) must be *received* (not merely *sent*) by the due date. *Id.* at 9-10. The Government thereby falls into the same trap as the Federal Circuit: the assumption that the invocation of equitable tolling to excuse noncompliance with a particular statutory deadline implicitly conflicts with that deadline.

That assumption, needless to say, misses the whole point of equitable tolling. The doctrine does not come into play at all *unless and until* a litigant has missed a deadline. Therefore, to prove that a particular pleading is untimely is not to prove that equitable tolling does not apply. If a litigant is run over by a car on his way to file a pleading on its due date, there is no question that the document is late, but the question remains whether equitable tolling can excuse that tardiness. To say that the "text, structure, and legislative history" of 38 U.S.C. § 7266 require a notice of appeal filed by Federal Express to *arrive* at the Veterans Court by the due date, Opp. 9, in

other words, is not to say that the "text, structure, and legislative history" of 38 U.S.C. § 7266 preclude equitable tolling under these circumstances.

To the contrary, the default rule is that equitable tolling *is* available "unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation omitted). Here, nothing in the text (not to mention the structure or history) of § 7266 says anything about tolling. Rather, the text, structure, and history of § 7266 simply establish that petitioner's appeal was untimely, a point petitioner does not dispute. What both the Federal Circuit and the Government are missing, in other words, is something to show that Congress intended to preclude equitable tolling *above and beyond* the fact that petitioner missed a statutory deadline, and does not fall within a statutory exception to that deadline. *See* Pet. App. 9a, Opp. 9-10. With respect to the availability of equitable tolling, the Federal Circuit *did* "proceed by negative implication alone." Opp. 9. For this reason, the decision below conflicts not only with this Court's decision in *Young*, but with the decisions of other courts of appeals recognizing that equitable tolling is not *per se* inapplicable where, as here, a litigant falls outside a particular exception to a statutory deadline. *See, e.g.*, *Neverson v. Farquharson*, 366 F.3d 32, 40-41 (1st Cir. 2004); *Chung v. Department of Justice*, 333 F.3d 273, 277 (D.C. Cir. 2003); *Perez v. United States*, 167 F.3d 913, 917 (5th Cir. 1999).

The Government thus misses the point by asserting that petitioner's position "would create another exception not contemplated by Congress" to the statutory deadline. Opp. 9. To hold that equitable tolling is available here would not be to hold that petitioner is entitled to relief. Rather, it would simply be to hold that petitioner has an opportunity to *seek* relief based on the equities of his particular situation. That is why equitable tolling is not inconsistent with a statutory deadline: whereas a litigant

who complies with a deadline need not prove anything more, a litigant who invokes equitable tolling bears the burden of proving that he is entitled to relief based on the equities of the case.

Nor is it true, as the Government asserts, that the Federal Circuit "did not foreclose the operation of equitable tolling" here as a matter of law, "but instead held only that petitioner's particular excuse for late filing was not one that merited equitable relief." Opp. 7. The Federal Circuit held that equitable tolling is categorically unavailable to veterans, like petitioner, who file untimely notices of appeal by Federal Express rather than U.S. mail. Pet. App. 7a-9a. Contrary to the Government's assertion, the Federal Circuit did *not* hold that equitable tolling is available here, but that petitioner was simply not entitled to "relief" under that doctrine based on the equities of this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, this Court should grant the petition, and either set the case for plenary review or summarily reverse the decision below.

Respectfully submitted,

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